

MONTANA LEGISLATIVE HISTORY

Chapter 421 19 95

Bill H _____ S 382

Original bill & history ☒ c

H. Committee on Natural Resources

Hearing Date(s) Mar 22 ☒ C

_____ C

_____ C

_____ C

Date Out Mar 23 ☒ C

S. Committee on Agriculture, Livestock &

Hearing Date(s) Feb 12 ☒ C Irrigation

_____ C

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Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

S. ~~B~~ Judiciary
Mar 02
Mar 06

SB 387 INTRODUCED BY BECK

CLARIFY APPLICATION OF COMMON LAW RULES OF ISSUE AND CLAIM
PRECLUSION TO ADJUDICATION OF EXISTING WATER RIGHTS

2/13	INTRODUCED		
2/13	FIRST READING		
2/13	REFERRED TO AGRICULTURE, LIVESTOCK & IRRIGATION		
2/14	FISCAL NOTE REQUESTED		
2/17	HEARING		
2/18	FISCAL NOTE RECEIVED		
2/18	FISCAL NOTE PRINTED		
2/27	REREFERRED TO JUDICIARY		
3/02	HEARING		
3/04	HEARING		
3/07	COMMITTEE REPORT—BILL PASSED AS AMENDED		
3/10	2ND READING PASSED	43	0
3/11	3RD READING PASSED	37	2
	TRANSMITTED TO HOUSE		
3/13	FIRST READING		
3/13	REFERRED TO NATURAL RESOURCES		
3/22	HEARING		
3/23	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/27	2ND READING CONCURRED	93	2
3/28	3RD READING CONCURRED	92	6
	RETURNED TO SENATE WITH AMENDMENTS		
4/03	2ND READING AMENDMENTS CONCURRED	43	2
4/04	3RD READING AMENDMENTS CONCURRED	45	4
4/08	SIGNED BY PRESIDENT		
4/08	SIGNED BY SPEAKER		
4/10	TRANSMITTED TO GOVERNOR		
4/13	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 421		
	EFFECTIVE DATE: 04/13/95		

SB 388 INTRODUCED BY HARP

PROVIDE FOR AN INTEGRATED MEDICAID MANAGED CARE PROGRAM

2/13	INTRODUCED		
2/13	FIRST READING		
2/13	REFERRED TO PUBLIC HEALTH, WELFARE & SAFETY		
2/14	FISCAL NOTE REQUESTED		
2/18	HEARING		
2/20	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/20	FISCAL NOTE RECEIVED		
2/20	FISCAL NOTE PRINTED		
2/21	REVISED FISCAL NOTE PRINTED		
2/21	2ND READING PASSED	49	0
2/22	3RD READING PASSED	50	0
	TRANSMITTED TO HOUSE		
2/27	FIRST READING		
2/27	REFERRED TO HUMAN SERVICES & AGING		
3/15	HEARING		
3/24	COMMITTEE REPORT—BILL CONCURRED		
3/27	2ND READING CONCURRED AS AMENDED	96	3
3/29	3RD READING CONCURRED	91	8
	RETURNED TO SENATE WITH AMENDMENTS		
4/04	2ND READING AMENDMENTS CONCURRED	32	16
4/05	3RD READING AMENDMENTS CONCURRED	45	5
4/08	SIGNED BY PRESIDENT		
4/10	SIGNED BY SPEAKER		

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SENATE BILL NO. 387

INTRODUCED BY Buck

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING ADDITIONAL FORFEITURE REMISSION FOR PERSONS FILING LATE WATER CLAIMS; IDENTIFYING CERTAIN SITUATIONS IN WHICH OBJECTIONS TO A WATER CLAIM MUST BE DISMISSED; EXPANDING THE WATER CLAIM APPEAL PROCESS; CLARIFYING STANDING FOR OBJECTIONS TO WATER CLAIMS; ESTABLISHING A WATER ADJUDICATION ADVISORY COMMITTEE; AMENDING SECTIONS 3-7-103, 85-2-214, 85-2-221, 85-2-225, 85-2-226, 85-2-233, AND 85-2-235, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

STATEMENT OF INTENT

A statement of intent is necessary for this bill because [section 1] encourages the Montana supreme court and the water court to adopt procedural rules. The legislature intends that the courts adopt abandonment relief rules that recognize the courts' existing equitable powers. These rules should consider and adopt equitable principles and existing rules of procedure, including but not limited to the equitable principles of detrimental reliance, good cause, equitable tolling, and excusable neglect and Rules 55 and 60, Montana and Federal Rules of Civil Procedure. The courts may by rule identify certain situations in which relief from abandonment will be granted after 1996 and under what terms relief will be granted in order to secure the interests of justice and may establish procedures for implementing [this act].

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-214, MCA, is amended to read:

"85-2-214. Commencement of action. (1) The action for the adjudication of all existing water rights under this part, part 7, and Title 3, chapter 7, is commenced with the issuing of the order by the Montana supreme court to file a statement of a claim of an existing water right as provided in 85-2-212. As to each claim, the action is considered filed in the judicial district of the county in which the diversion is made or, if there is a claimed right with no diversion, in the judicial district of the county in which the use occurs.

(2) The water judge shall monitor the claim filing procedure for claims within ~~his~~ the water division

1 and make any orders necessary to assure timely and accurate compliance with the claim filing procedure.

2 (3) The water judge may relieve a party from abandonment of a claim under 85-2-226, as follows:

3 (a) For claims filed after July 1, 1996, but before the issuance of a preliminary decree, relief may
4 be granted for good cause shown and upon those terms as are just and in accordance with 85-2-224.

5 (b) For claims filed after the entry of a preliminary decree, relief may be granted under the
6 provisions of Rule 60, Montana Rules of Civil Procedure.

7 (4) The Montana supreme court and the water court are encouraged to adopt procedural rules
8 required to implement the provisions of subsection (3)."

9
10 **Section 2.** Section 85-2-221, MCA, is amended to read:

11 **"85-2-221. Filing of claim of existing water right -- filing late claim.** (1) A person claiming an
12 existing right, unless exempted under 85-2-222 or unless an earlier filing date is ordered as provided in
13 85-2-212, shall file with the department no later than June 30, 1983, a statement of claim for each water
14 right asserted on a form provided by the department.

15 (2) The department shall file a copy of each statement of claim with the clerk of the district court
16 for the judicial district in which the diversion is made or, if there is a claimed right with no diversion, the
17 department shall file a copy of the statement of claim with the clerk of the district court of the judicial
18 district in which the use occurs.

19 (3) Subject to certain terms and conditions, the legislature intends to provide for the remission of
20 the forfeiture of existing rights to the use of water caused by the failure to comply with subsection (1) as
21 provided under 85-2-214. Accordingly, with respect only to a basin that has not been closed to further
22 appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter prior to July 1,
23 1993, a claim of an existing water right not filed with the department on or before April 30, 1982, may be
24 filed with the department ~~on or before July 1, 1996,~~ on forms provided by the department. This section
25 is ~~not~~ intended to ~~prevent~~ allow the filing of a late claim ~~in addition to a claim of an existing water right filed~~
26 ~~on or before April 30, 1982,~~ if and to the extent that the ~~additional~~ right claimed is not the same as the
27 right that was the subject of a previous claim and is not an abandoned right. ~~Claims must be physically~~
28 ~~submitted to the department or sent by United States mail, postmarked on or before the deadline set forth~~
29 ~~in this subsection, in order to be considered timely. The~~ Late claims are then subject to adjudication by the
30 district courts as any other claim of existing right. ~~The claimant is then subject to all rights and obligations~~

1 ~~of any other party, except that~~ water court, subject to the provisions of this part, rules adopted by the
2 Montana supreme court or the water court, and the following:

3 (a) a late claim must be incorporated into the adjudication, subject to all proceedings that have
4 taken place prior to the date of filing;

5 (b) the person filing a late claim may request that a decree previously entered be reopened or may
6 object to matters previously determined on the merits by the water court only to the extent that the request
7 or objection is otherwise authorized by law and is based on a claim of water right filed on or before April
8 30, 1982;

9 (c) a person filing a late claim does not have the right or standing to object to any water rights
10 compact reached in accordance with part 7 of this chapter that is ratified by the legislature prior to July
11 1, 1993, except to the extent that right or standing to object exists based on a claim of water right filed
12 on or before April 30, 1982, or to claim protection for the right represented in the late claim under any
13 provision of ~~such~~ a compact that subordinates the use of a water right recognized in the compact to a right
14 recognized under state law;

15 (d) if the water judge, ~~following objection under 85-2-233,~~ finds that the right represented in the
16 late claim was the subject of a prior order or decree by the water judge or is otherwise without merit, the
17 water judge shall award costs and reasonable attorney fees to the person or persons filing ~~the an~~ objection
18 to a late claim;

19 (e) a right represented in a late claim is may be subordinate to ~~all federal and Indian reserved water~~
20 ~~rights established by compact or decree under this chapter~~ other water rights upon terms that the court
21 determines are just under the circumstances;

22 (f) ~~unless a late claim either was placed in the United States mail and postmarked on or before April~~
23 ~~30, 1982, or, if there is no evidence of the date of mailing, there is evidence of execution on or before April~~
24 ~~30, 1982, and actual receipt by the department on or before May 7, 1982, the right represented in the~~
25 ~~claim is, in addition, subordinate to:~~

26 (i) ~~rights represented in all valid, timely filed claims; and~~

27 (ii) ~~rights represented in a permit or reservation of water issued under this chapter if and to the~~
28 ~~extent that the person holding the permit or reservation files an objection under this part and proves that~~
29 ~~the person holding the permit or reservation reasonably relied to the detriment of the person holding the~~
30 ~~permit or reservation upon the failure of the claimant to file a claim on or before April 30, 1982.~~

1 ~~(4) The department and the district courts may not accept any statements of claim physically~~
2 ~~submitted or postmarked after July 1, 1996, and shall notify a person who files a claim after July 1, 1996,~~
3 ~~that the claim will not be accepted~~ late claims filed after July 1, 1996, are subject to the provisions of
4 85-2-214(3)(a)."

5
6 **Section 3.** Section 85-2-225, MCA, is amended to read:

7 **"85-2-225. Filing fee -- processing fee for remitted claims.** (1) Each claim filed under 85-2-221
8 or 85-2-222 must be accompanied by a filing fee in the amount of \$40, subject to the following exceptions:

9 (a) the total filing fees for all claims filed by one person in any one water court division may not
10 exceed \$480; and

11 (b) ~~no~~ a filing fee is not required accompanying a claim of an existing right that is included in a
12 decree of a court in the state of Montana and that is accompanied by a copy of that decree or pertinent
13 portion ~~thereof~~ of the decree.

14 (2) A claim that is exempt from the filing requirements of 85-2-221(1) but that is voluntarily filed
15 must be accompanied by a filing fee in the amount of \$40. Exempt claims for a single development with
16 several uses if filed simultaneously may be accompanied by a filing fee in the amount of \$40.

17 (3) (a) Except as provided in subsection (3)(c), in addition to the filing fee set forth in subsection
18 (1), each statement of claim filed under 85-2-221(3) must be accompanied by a processing fee in the
19 amount of \$150, which must be deposited in the water rights adjudication account for the examination of
20 late claims by the department ~~and for the publication of notices by the department as required under~~
21 ~~85-2-213(2).~~

22 (b) The water judge ~~shall~~ may assess against the late claimant all reasonable administrative costs
23 and expenses that may be incurred by the court ~~due to the filing of the late claim and the consideration of~~
24 ~~the objection, which in reaching a determination whether to relieve a party from abandonment as provided~~
25 in 85-2-214. The court may award other fees and expenses against the party asserting a late claim as it
26 determines just under the circumstances. Any assessment rendered by the court must be deposited in the
27 water rights adjudication account.

28 (c) For a statement of claim that was filed after April 30, 1982, but prior to July 1, 1993, or for
29 a statement of claim filed by a state agency, the processing fee provided for in subsection (3)(a) must be
30 paid on or before a date to be established by the department by rule, but no later than July 1, 1999."

1 **Section 4.** Section 85-2-226, MCA, is amended to read:

2 **"85-2-226. Abandonment by failure to file claim.** ~~The~~ Except as provided in 85-2-214, the failure
3 to file a claim of an existing right as required by 85-2-221(1) establishes a conclusive presumption of
4 abandonment of that right."

5
6 **Section 5.** Section 3-7-103, MCA, is amended to read:

7 **"3-7-103. Promulgation of rules and prescription of forms -- advisory committee.** (1) As soon as
8 practicable the Montana supreme court may promulgate special rules of practice and procedure and shall
9 prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in
10 consultation with the water judge and the department of natural resources and conservation.

11 (2) (a) The chief water judge shall appoint a water adjudication advisory committee to provide
12 recommendations to the water court, the Montana supreme court, the department of natural resources and
13 conservation, and the legislature on methods to improve and expedite the water adjudication process.

14 (b) The committee consists of four attorneys who practice before the water court and three water
15 users who have filed statements of claim with the department of natural resources and conservation under
16 this chapter.

17 (c) The chief water judge or the judge's designee shall serve as an ex officio member of the
18 committee. The Montana supreme court may appoint the attorney general or the attorney general's
19 designee and a representative from the department of natural resources and conservation as ex officio
20 members of the committee.

21 (d) The committee members shall serve at the pleasure of the water court and shall serve without
22 compensation.

23 (e) The committee shall file a report with the Montana supreme court by October 1, 1996, and as
24 often as determined by the Montana supreme court."

25
26 **Section 6.** Section 85-2-233, MCA, is amended to read:

27 **"85-2-233. Hearing on temporary preliminary decree or preliminary decree.** (1) (a) For good cause
28 shown and subject to the provisions of subsection (7), a hearing shall must be held before the water judge
29 on any objection to a temporary preliminary decree or preliminary decree by:

30 (i) the department;

1 (ii) a person named in the temporary preliminary decree or preliminary decree;
2 (iii) any person within the basin entitled to receive notice under 85-2-232(1); or
3 (iv) any other person who claims rights to the use of water from sources in other basins that are
4 hydrologically connected to the sources within the decreed basin and who would be entitled to receive
5 notice under 85-2-232 if ~~his~~ the claim or claims were from sources within the decreed basin.

6 (b) For the purposes of this subsection (1), "good cause shown" means a written statement
7 showing that a person has an ownership interest in water or its use that has been affected by the decree.

8 (c) A person does not waive the right to object to a preliminary decree by failing to object to a
9 temporary preliminary decree. However, a person may not raise an objection to a matter in a preliminary
10 decree if ~~he~~ that person was a party to the matter when the matter was previously litigated and resolved
11 as the result of an objection raised in a temporary preliminary decree, unless the objection is allowed for
12 any of the following reasons:

13 (i) mistake, inadvertence, surprise, or excusable neglect;
14 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move
15 for a new trial under Rule 59(b), Montana Rules of Civil Procedure;
16 (iii) fraud, misrepresentation, or other misconduct of an adverse party;
17 (iv) the judgment is void; or
18 (v) any other reason justifying relief from the operation of the judgment.

19 (2) If a hearing is requested, the request must be filed with the water judge within 180 days after
20 entry of the temporary preliminary decree or preliminary decree. The water judge may, for good cause
21 shown, extend this time limit up to two additional 90-day periods if application for an extension is made
22 prior to expiration of the original 180-day period or any extension of it.

23 (3) The request for a hearing ~~shall~~ must contain a precise statement of the findings and conclusions
24 in the temporary preliminary decree or preliminary decree with which the department or person requesting
25 the hearing disagrees. The request ~~shall~~ must specify the paragraphs and pages containing the findings
26 and conclusions to which objection is made. The request ~~shall~~ must state the specific grounds and
27 evidence on which the objections are based.

28 (4) Upon expiration of the time for filing objections and upon timely receipt of a request for a
29 hearing, the water judge shall notify each party named in the temporary preliminary decree or preliminary
30 decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to

participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing ~~shall~~ must be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in ~~M.R.Civ.P.~~ Montana Rules of Civil Procedure, Rule 53(e).

(5) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or 85-2-703 bars any subsequent cause of action in the water court.

(6) If the court sustains an objection to a compact, it may declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact ~~shall be~~ is permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall ~~thereafter~~ issue a new preliminary decree in accordance with 85-2-231~~1~~, ~~provided,~~ however ~~However~~, that any party to a compact declared void may appeal from ~~such~~ that determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal ~~shall stay~~ stays the period for filing a statement of claim as required under this subsection.

(7) Upon petition by a claimant, the water court shall grant a motion for dismissal to an objection to a temporary preliminary or preliminary decree if the objection pertains to an element of a water right that was previously decreed and:

(a) the objector or the objector's predecessor in interest was a party to the previous decree;

(b) the claimant's water right was challenged in the previous decree litigation;

(c) the claimant's water right was actually litigated;

(d) a determination was made by the court regarding the elements of the water right that are the subject of objection; and

(e) the right as claimed conforms to the previous decree."

Section 7. Section 85-2-235, MCA, is amended to read:

"85-2-235. Appeals from final decree. (1) A person whose existing rights and priorities are determined in ~~the~~ a final decree may appeal the determination only if:

~~(1)(a)~~ he the person requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree; or

~~(2)(b)~~ his the person's rights or priorities as determined in the temporary preliminary decree or the

1 preliminary decree were affected as the result of an objection filed by another person.

2 (2) An interlocutory ruling by the water judge upon a motion raising a question of law may be
3 appealed by any party affected by the decision and who participated in the proceedings on the motion."

4
5 NEW SECTION. **Section 8. Effective date.** [This act] is effective on passage and approval.

6 -END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0387, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

This act provides additional forfeiture remission for persons filing late water right claims; identifies certain situations in which objections to water right claims must be dismissed; expands the water right claim appeal process; clarifies standing for objections to water right claims; and establishes a water adjudication advisory committee.

ASSUMPTIONS:

1. Late claims--claims of existing water right not filed with the Department of Natural Resources and Conservation by April 30, 1982--can be filed until issuance of a final decree.
2. There is no way of knowing exactly how many late claims may be filed under the terms of this act. Based on experience with late claims associated with SB310 passed by the 1993 Legislature, it is estimated that 150 claims per year would be filed each year of the 1997 biennium.
3. The Water Court is not likely to hold any hearings on late claims during the 1997 biennium, and a hearing will not be held unless an objection is filed against the claim.
4. The filing percentage of additional late claims will be similar to the percentage breakdown of the approximately 3391 late claims currently filed: 42% stockwater, 36% irrigation, 15% domestic, and 7% other.
5. Approximately 2609 additional late claims will be filed over the life of the adjudication for a total of 6,000.
6. Approximately 32% of the late claims will receive objections. Assuming 6,000 late claims are filed, then 1920 will receive an objection.
7. Every late claim receiving an objection will require the Water Court to spend one more day on the adjudication.

FISCAL IMPACT:

Department of Natural Resources and Conservation

	<u>FY96</u>	<u>FY97</u>
	<u>Difference</u>	<u>Difference</u>
<u>Expenditures:</u>		
Processing Costs	22,500	22,500
<u>Revenues:</u>		
Water Rights Adjudication (02)	26,100	26,100
<u>Net Impact:</u>	3,600	3,600

(continued on page 2)

Dave Lewis 2.18.95
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Sen Tom Beck 2-18-95
TOM BECK, PRIMARY SPONSOR DATE

Fiscal Note for SB0387, as introduced

SB 387

FISCAL IMPACT:

Water Court

Based upon the current Water Court budget and staff numbers, adjudication will be extended 1.28 years and the Water Courts expenditures will be increased by \$666,880 over the term of the adjudication.

TECHNICAL NOTES:

1. Because the filing period will be extended until issuance of a final decree, the federal government may challenge Montana's adjudication program as not meeting the McCarran amendment requirements and may seek to have their claims adjudicated in federal court.
2. The passage of SB310 by the 1993 Legislature has resulted in 286 late claims being filed since July 1, 1993. SB310 extends late claim filing until July 1, 1996; this act would extend claim filing until a final decree is issued.

SENATE AGRICULTURE, LIVESTOCK & IRRIGATION

Page 4

- BILL NO - REFERRED - HEARING - OTHER CONSIDERATION DATES - EXECUTIVE ACTION/DATE/VOTE - REREFERRED - DATE READ

SB0289	BROOKE, VIVIAN	2/01	2/08	REVISE AUTHORITY OF AG DEPT TO ISSUE COMPLIANCE ORDER FOR CHEM SPILLS	DO PASS	2/08	VOTE:		2/08
SB0319	HERTEL, JOHN	2/07	2/10	PROMOTION AND MARKETING OF MONTANA BEEF AND BEEF PRODUCTS; ASSESSMENT	PASS AS AMENDED	2/10	VOTE:		2/10
SB0364	SPRAGUE, MIKE	2/10	2/15	REVISE MILK PRICE CONTROL; COMPETITIVE PRICING AND FIRST CALL ON MT MILK	PASS AS AMENDED	2/15	VOTE:		2/16
SB0387	BECK, TOM	2/13	2/17	CLARIFY WATER RIGHTS ADJUDICATION; EXPAND THE WATER CLAIM APPEAL PROCESS			VOTE:	JUDICIARY	
SB0389	TVEIT, LARRY	2/13	2/15	CLARIFY AND REVISE GAME FARM ADMIN BY DEPTS OF FWP & LIVESTOCK	PASS AS AMENDED	2/17	VOTE:		2/18
SB0394	DEVLIN, GERRY	2/14	2/17	DEFINE GRAY WOLF AS PREDATOR CONTINGENT UPON DELISTING, FOR CONTROL PURPOSES	DO PASS	2/17	VOTE:		2/17
SJ0017	JENKINS, LOREN	2/16	2/17	RESOLUTION TO URGE CURTAINMENT OF WETLANDS PROJECT AT LONESOME LAKE	DO PASS	2/17	VOTE:		2/17

MINUTES

**MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON AGRICULTURE, LIVESTOCK & IRRIGATION

Call to Order: By CHAIRMAN CHUCK SWYSGOOD, on February 17, 1995,
at 12:10 p.m.

ROLL CALL

Members Present:

Sen. Charles "Chuck" Swysgood, Chairman (R)
Sen. Gerry Devlin, Vice Chairman (R)
Sen. Thomas A. "Tom" Beck (R)
Sen. Don Hargrove (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Greg Jergeson (D)
Sen. Linda J. Nelson (D)
Sen. Bob Pipinich (D)

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council
Jennifer Gaasch, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SJR 17, SB 394, and SB 387
Executive Action: SB 394, SJR 17, and SB 389

{Tape: 1; Side: A}

HEARING ON SJR 17

Opening Statement by Sponsor:

SENATOR LOREN JENKINS. SD 45, Big Sandy, stated that outside of the Big Sandy there is an area called Lonesome Lake. In 1919 there was an irrigation project and Lonesome Lake would be the water source. Now the Bureau of Reclamation wants to return primacy to a different agency. The Resolution says that it has been studied by Duck's Unlimited and it is not a wetland area. There is only 30% chance of receiving any amount of water in the year. It has been filled only one time that he can remember. SJR asks to let the Bureau of Land Management (BLM) be the primary agency managing the complex to go ahead and be able to

Informational Testimony:

Bob Martinka, representing Montana Fish, Wildlife, and Parks, read his written testimony. (EXHIBIT #2)

Questions From Committee Members and Responses:

None

Closing by Sponsor:

SEN. DEVLIN said the reason for the bill was if the wolf was taken off the list by the United States government he would want people to be able to hunt the animal and keep them out of the livestock. Perhaps the hunters would like to keep the wolf out of the game. He said the North American continent has a lot of wolves. He said he wanted to be able to do the same in Montana as they do in Alaska if the wolf is taken off the list.

EXECUTIVE ACTION ON SB 394

Motion/Vote:

SENATOR BOB PIPINICH MOVED SB 394 DO PASS. The MOTION CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON SJR 17

Motion/Vote:

SEN. PIPINICH MOVED SJR 17 DO PASS. The MOTION CARRIED UNANIMOUSLY.

HEARING ON SB 387

Opening Statement by Sponsor:

{Tape: 1; Side: A; Approx. Counter:; Comments: The tape was not recording during the opening statement by the sponsor or the first part of Jan Rehberg's testimony..}

SENATOR TOM BECK, SD 28, Deer Lodge, stated there were three different sections to SB 387. He went through the bill and explained what each one said.

Proponents' Testimony:

(the tape began recording in the middle of the testimony by Jan Rehberg. the counter began on 52.1 when the recorder started working.)

Jan Rehberg said they had been working at this since 1982 and are only a fraction of the way through the process. She said they would like to get all of the ideas together and make suggestions to the legislature. They really need to do that to speed up the process and under control. She said that was the need for the advisory committee. (EXHIBITS #3, #4, #5, and #6 were passed out during Jan Rehberg's testimony)

Patty Walker, from Glenn, Mt., read her written testimony.
(EXHIBIT #7)

Holly Franz, representing the Montana Power Company and herself as a water attorney, stated she would like to address the Water Board Advisory Council. It is time to get something together to help the Water Board out to see if there is a more efficient way to go about the problem. The second provision of the bill having to do with excepting existing decreed rights as is. She said that was a good idea, but she proposed an amendment to the section. (EXHIBIT #8) She stated the concern was there was a situation where a very large entity was relying on a decree for thousands of acres of irrigation that did not begin until the 1980's. She said as drafted the laws provision could have very adverse impacts to the distort water users in the Sun River Valley. She said that was the purpose of her amendment.

Peter Wipf, secretary of the Martinsdale Colony, stated they lost 18 water claims 6 of which were for irrigation and the other 12 for stock water. The claims are a part of their historic rights. They lost their rights on the part of the DNRC. He said they strongly support the passage of SB 387 so they can reestablish their rights to the water they had for the last 38 years. They bought the land with the water rights and never intended to not file on them. Without the passage of SB 387 they will not have the legal right to the water they have been using.

John Bloomquist, representing the Montana Stockgrowers Association and representing himself, a water attorney from Dillon and Helena, Mt., stated on section 5 as Ms. Franz pointed out SEN. BECK is making an effort to start to address some of the issues which may streamline and get the water adjudication process moving quicker. The Montana Stockgrowers Association supports a court driven adjudication process. He suggested to the present make-up of the advisory committee that there be a district judge who served as a water division judge, be appointed to that committee. A district judge might be a very good addition to that group when rewriting some proceedings. The second thing would be section 6. He said the present language "where the water court shall grant a motion for dismissal" might be a little too constrictive. They may want to change on line 15

the word "shall" to the word "may". He said with those two corrections they have a good bill.

{Tape: 1; Side: B; Approx. Counter: ; Comments: .}

Lyle Richards, said he thought there were a lot of people who were late claimers. They were not taking water from anyone, they already had the water.

Mons Teigen, Helena, Montana, said their law firm filed the stock water claims, but they did not file the irrigation claims. He urged the committee's support on SB 387.

SENATOR LINDA NELSON stated she would like to enter the name of Echo Garber as a proponent. She sent a copy of a letter. (EXHIBIT #9)

Opponents' Testimony:

Dan Andrews, President of the Greenfield Irrigation District, read his written testimony. (exhibit #10)

Don Rose, representing Fort Shaw Irrigation District, read his written testimony. (EXHIBIT # 11) He said he objected to the language on page 2.

Chris Tweeten, the Attorney General's appointed representative on the Reserve Water Rights Compact Commission, stated the commission was to negotiate settlements of federal reserve water rights claims for water in the State of Montana. The water rights are held by the United States government either on its own behalf or its own agencies or in trust for the Indian tribes that have reservations within the State of Montana. He said late claims effect their compact negotiations in two different ways. In respect to compacts that have been negotiated and have either been ratified by the legislature or are waiting ratification by the legislature, the negotiation process from the commissions perspective involves making sure all existing rights to water are protected. They do that is by looking at filed claims. He said if late claims were allowed to come into the process after those compacts a negotiated and settled it has the potential to upset the expectations of the part because that actual amount of water that is going to be subject to subordination by the federal government will change if late claims come in and then are not allowed in the adjudication process. He said SB 387 strikes the language from SB 310, which was passed in a previous legislation. The second way late claims cause problems for the compact negotiations, basically extends that problem into the future. As they open negotiations with Indian tribes in the future, they need to be able to know the amount of existing water use. Allowing late claims into that process establishes existing uses as a moving target and they will never be sure what the existing use is effected by late claims. He said they have some amendments to be handed out. (EXHIBIT #12) He said the

amendments were to reestablish the balance that was established in SB 310 in a previous legislature. He said that would be for the protection of existing compacts and the ability to reach compacts in the future. He said they would like to offer the amendments for the committee's consideration.

Lorna Frank, representing the Montana Farm Bureau, stated they have a problem with the first section they have members on both sides of the issue. One of their concerns was with the advisory council. With the advisory council taking a look at the rules, is that really going to speed up the adjudication process. They would like to see the adjudication process completed in an orderly manner and as soon as possible. She said she would be interested in hearing more about how the council was going to work with the judge and how the process was going to be sped up.

Informational Testimony:

None

Questions From Committee Members and Responses:

CHAIRMAN SWYSGOOD asked Chris Tweeten if he could make available to the committee the compacts they have completed and the streams and sub basins that are affected by those compacts?

Chris Tweeten replied the compacts themselves are modified in the code books in Title 85 and they could provide the committee with the stream basins that are involved in the compacts. The only one that will not appear in the code book was the one that was recently ratified by the Senate and is on its way over to the House.

SEN. DEVLIN asked to know which one's they were working on currently. Chris Tweeten replied the commission was currently well along with negotiations with the Chippewa Creek tribes at Rocky Boy, they expect they will have a compact with them to present to the legislature in 1997. They have been asked to resume negotiations with the Crow tribe and they have had some preliminary discussions with them. They have had some discussions with the BLM over their reserved water rights claims for the Wild and Scenic Missouri River and for the Bear Trap Canyon recreation area. He said there are discussions with the Forest Service as well and are not very well involved at that point. He said they would not have a compact with them any time soon. They have recently been contacted by the Flathead tribes with a request that they try to come up with some type of time table for the reconcondensing of discussions with them about their reserve rights. SEN. DEVLIN replied he would be interested in a time table and the projects. Chris Tweeten replied he did not know if he could give them a time table beyond what he just described.

CHAIRMAN SWYSGOOD replied for the information for this committee as it concerns raised by the Compact Commission as it relates to the late claim filings in upsetting the compacts that those discussions that are going on with others have not been completed and do not have a bearing on SB 387. They need to see those which have been completed and they need to see those.

SENATOR RIC HOLDEN said when Mr. Tweeten was giving his testimony he thought SB 310 had solved the problems, but the testimony heard today it seems as if there are a lot of problems. Chris Tweeten replied he was limiting his testimony to the issues as it relates to the Reserve Water Rights Compact Commission. He said Montana was an active participant in the development of SB 310 and they also participated in the interim study. He said all of that participation had been driven by the positions that had been adopted by the issues by the Governor's office. The Governor's office has considered SB 387 and decided not to take a position on it. He said he was only here to talk about the Compact Commission.

SENATOR DON HARGROVE asked SEN. BECK his position on the advisory committee. SEN. BECK replied the advisory committee was four attorneys and three irrigators. There was the suggestion made to put a district on the committee and he would do that by replacing one of the attorneys with the judge. He said they were going through too much paper work and the committee would maybe cut back on that process.

SEN. JERGESON asked Jan Rehberg if she got the list (EXHIBIT #6) from the Department of Natural Resources (DNRC)? He asked if there was a similar list at DNRC of those people who did file their claims on a timely basis? Jan Rehberg replied she suspected they could generate that if requested. Bob Harrington, representing DNRC, replied he would be happy to answer the question. SEN. JERGESON said the question related to the number of late claims that are indicated by the list (EXHIBIT #6) how many claims were filed by Montana water users and did not miss the deadline? He asked if they knew the total claims filed. Bob Harrington replied there were about 213,000 claims that were filed on time. He said so far to date there were roughly 3,500 late claims that have come in since the 1992 deadline. He said there would be an update to that list. He said they could generate a new list.

CHAIRMAN SWYSGOOD asked Jan Rehberg to make a comment relating to the Compact Commission. Jan Rehberg replied the Compact Commission tries to develop a contract with those who have reserve water rights. The Compact Commission has tried to negotiate those contacts prior to the time when a decree or preliminary decree is issued on those basis. She said the Cheyenne compact, the compact was negotiated and then they set out to see if the people would agree with it. They still have not adjudicated the state water rights in those basins. Mr. Tweeten said they look at the water rights that are on file,

however in meetings involving the Cheyenne compact it was disclosed that in looking at those water rights they did look at the late claims that had been filed as well. She said Mr. Tweeten said they look at the rights as filed because they are evidence of the claim, however those who have worked in the process recognize that when those claims were filed the DNRC in an effort to protect people said from now on every right they think they might have they should file on it, file on everything. As a result the claims are very extensive and to a certain degree they are overstated. If they are looking at the claims as they were filed there is a great potential that when the decree goes through the actual amount of water that is going to be decreed is going to be less than appears on the claim. It should be determined on a case by case basis is for those basins in which the actual water use comes out less than they anticipated then there would be no harm in allowing the late claims in. If there is a problem the federal government should look at that problem instead of the state Compact Commission.

CHAIRMAN SWYSGOOD asked Chris Tweeten to respond to the statements made by Jan Rehberg. Chris Tweeten said the statute is set up so they have to negotiate before the preliminary decrees come out. At the situation in Cheyenne they did look at all of the file claims and the department had looked at those that had been late claims. They agreed to subordinate their rights to the rights that had been decreed in the Tongue River. He said they were further decreed in SB 176. He said they did not agree to subordinate to any late claims. The problem created by Sb 387 goes beyond that because the compacts would not even have the information about the late claims that were filed at the time and the door would still be open to late claims coming in after the compact had been ratified by the legislature.

CHAIRMAN SWYSGOOD said as far as the Cheyenne are concerned are there any of those adjudicated claims that they agreed to subordinate? Are any of them late claims or could be late claims? Chris Tweeten replied no.

SENATOR REINY JABS asked when they adjudicate the compacts do they inform them that there might be some late claims or do they just take them as they are coming in? Chris Tweeten replied that everyone knows that there were late claims that had been filed when they were negotiated the Northern Cheyenne because DNRC had them listed. Because of a law in existence at that time the understanding was the late claims were abandoned and forfeited and they did not exist any more and on that basis they agreed to a compact.

CHAIRMAN SWYSGOOD asked as it relates to the uncertainty of what late claims filing decision would be, as related to the adjudication process which was not a completed and the concern expressed by the Compact Commission and other objectors to SB 387 as it relates to the adjudication process not being completed and

that uncertainty would be the same on either case. Chris Tweeten replied he did not think so. The agreement with Northern Cheyenne was they would subordinate to the Tongue River Basin to those rights that were decreed in 1911 on the Tongue River provided they were claimed in the adjudication and decreed by the water court. They excluded late claims from the protection of that subordination.

CHAIRMAN SWYSGOOD said he asked the President to put SB 387 on the list that would take more time than transmittal. He said he did not feel comfortable in making a rash decision and this bill will not have to meet the transmittal deadline.

CHAIRMAN SWYSGOOD said because SB 310 was in place when starting negotiations with the Cheyenne and SB 76 was in effect when they started negotiations with the Cheyenne and under SB 76 whatever that law applied, that was what they used for the Cheyenne negotiations. So that was done. The ones that they were having discussions with, and let's say another piece of legislation passes and it has different rules that apply, then would those compacts be negotiated on the legislation that was in effect at that time. Chris Tweeten replied they would have no choice, but to do that. The question would be whether the parties they were negotiating with would be interested in negotiating a compact that subordinated their claim to rights on which they would have no notice.

SEN. DEVLIN asked why it took the bill so long to be heard in the Agriculture Committee. SEN. BECK said he just put the title in early, the bill was not completed at that time.

Closing by Sponsor:

SEN. BECK replied the fair thing to do for adjudicated water rights, it is unfair they cannot get them back into the process. He said he did not intend to interfere with any of the compacts. The committee could try to extradite the water system. He said he wanted to speed up the process of adjudication. The litigation was the third one. There is a letter there that denied someone the due process of law. He said he was not trying to deny anyone. He was trying to get rid of lawsuits. He said he hoped they could help some people.

EXECUTIVE ACTION ON SB 389

Discussion:

SEN. SWYSGOOD replied there was an amendment offered by Paul Sihler. (EXHIBIT #12)

SEN. DEVLIN asked if they had put that in the bill at the last meeting?

Doug Sternberg replied the amendment was never actually offered.

MONTANA SENATE
1995 LEGISLATURE
AGRICULTURE COMMITTEE

ROLL CALL

DATE _____

2-17-95

[illegible]

SEN:1995

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EXHIBIT NO. 3

DATE 2-17-95

BILL NO. SB 387

COPY

Grizzly Peak Realty

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February 17, 1995

ATTN: Senate Natural Committee FAX NO. 1 (406) 444-4604

Senators: Chuck Swysgood, Chair
Gerry Devlin, Vice-Chair
Tom Beck
Rick Holden
Greg Jergeson
Bob Pipinich

Don Hargrove
Reiny Jabs
Linda Nelson

RE: New Late Claim Legislation

Dear Senators:

Please strongly support SB 387, New Late Claims Legislation.

It is economically very important to people on the land, whose livelihood depends on irrigated production. These land owners thought a ditch company was recording their water rights, while the ditch company thought the individual was filing, hence the filings after April 30, 1982.

Thank you for your time and your consideration.

Very sincerely,

Paul Pilati

PP/cp

Post-It™ brand fax transmittal memo 7671		# of pages
To	From	
Sanjeev Rehsberg	Paul Pilati	
Co.	Co.	
Dept.	Phone #	
Fax #	Fax #	
(406) 449-5149	(406) 446-3045	

CITY OF HAVRE

Phone (406)265-6719
P.O. Box 231
HAVRE, MONTANA 59501

February 17, 1995

SENATE AGRICULTURE
EXHIBIT NO. 4
DATE 2-17-95
BILL NO. SB 387

Chairman Senator Chuck Synsgood
Senate Agriculture Committee
State of Montana
Capitol Station
Helena, MT 59624

RE: Senate Bill 387

Dear Chairman Swynsgood and Committee Members:

I am special counsel for the City of Havre, representing the City on water rights matters. After the City filed its water rights claims in 1982, it entered negotiations with the Reserved Water Rights Commission concerning its rights. It also continued searching for other water rights. As a result several water rights in the name of the City but administered by the Hill County Airport Board and the local flood control districts were discovered.

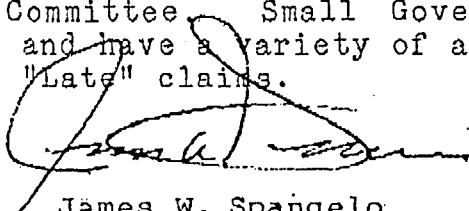
The City filed upon these rights, and filed alternative claims on rights previously filed upon because of concern about the meaning of "municipal" as a water right use. However, these claims were filed in 1983, and thus were "Late Claims". We then quit negotiating with the compact commission. A statute seems to indicate any claims filed while we were negotiating are timely.

Under "In The Matter of Adjudication of the Water Rights Within the Yellowstone River, 253 MT 167, 832 P.2d 1210 (1992)", the water rights covered by these claims were subject to "forfeiture" without any notice to us or opportunity to argue our special factual situation.

The City of Havre was involved with the passage of Senate Bill 310 in the last session, and in particular Section 10, while authorized a "Late Claim Interim Study" by the Water Policy Committee, and particularly Sections (i) dealing with trust responsibilities and (k) dealing with "impacts on municipal in Government . . ." No hearing was held on these matters by the committee.

The City of Havre Senate this Legislation (SB 387) and asks favorable consideration by the Committee. Small Governmental Agencies have little or no staff, and have a variety of arguments to bring in favor of allowing the "Late" claims.

Thank you.


James W. Spangelo

DATE

5B 387

CHAPTER 90.14

WATER RIGHTS—REGISTRATION—WAIVER
AND RELINQUISHMENT, ETC.

Section

- 90.14.010. Purpose.
- 90.14.020. Legislative declaration.
- 90.14.030. Repealed.
- 90.14.031. Definitions.
- 90.14.040. Repealed.
- 90.14.041. Claim of right to withdraw, divert or use ground or surface waters—Filing statement of claim required—Exemptions.
- 90.14.043. Claim of right to withdraw, divert or use ground or surface waters—Claim upon certification by board—Procedure—Cut-off date for accepting petitions.
- 90.14.044. Existing water rights not impaired.
- 90.14.050. Repealed.
- 90.14.051. Statement of claim—Contents—Short form.
- 90.14.060. Repealed.
- 90.14.061. Statement of claim—Filing procedure—Processing of claim—Fee.
- 90.14.065. Statement of claim—Amendment—Review of department of ecology's determination.
- 90.14.070. Repealed.
- 90.14.071. Failure to file claim waives and relinquishes right.
- 90.14.080. Repealed.
- 90.14.081. Filing of claim not deemed adjudication of right—Prima facie evidence.
- 90.14.090. Repealed.
- 90.14.091. Definitions—Water rights notice—Form.
- 90.14.100. Repealed.
- 90.14.101. Notice of chapter provisions—How given—Requirements.
- 90.14.110. Repealed.
- 90.14.111. Water rights claims registry.
- 90.14.120. Repealed.
- 90.14.121. Penalty for overstating claim.
- 90.14.130. Reversion of rights to state due to nonuse—Notice by order—Relinquishment determinations—Appeal.
- 90.14.140. "Sufficient cause" for nonuse defined—Rights exempted.
- 90.14.150. Rights arising from permit to withdraw public waters not affected—Extensions.
- 90.14.160. Relinquishment of right for abandonment or failure to beneficially use without sufficient cause—Prior rights acquired through appropriation, custom or general adjudication.

EXHIBIT NO. 5

DATE 2-17-95

REGISTRATION, RELINQUISHMENT, ETC. BILL NO. 90.14.010 5B 38

Section

- 90.14.170. Relinquishment of right for abandonment or failure to beneficially use without sufficient cause—Rights acquired due to ownership of land abutting stream, lake, or watercourse.
- 90.14.180. Relinquishment of right for abandonment or failure to beneficially use without sufficient cause—Future rights acquired through appropriation.
- 90.14.190. Water resources decisions—Appeals—Attorneys' fees.
- 90.14.200. Implementation and enforcement of chapter—Proceedings under RCW 90.14.130 deemed adjudicative—Application of RCW sections to specific proceedings.
- 90.14.210. Chapter applies to all rights to withdraw ground waters.
- 90.14.215. Chapter not applicable to trust water rights under chapter 90.38 or 90.42 RCW.
- 90.14.220. No rights to be acquired by prescription or adverse use.
- 90.14.230. Rules and regulations.
- 90.14.900. Effective date—1967 c 233.
- 90.14.910. Severability—1967 c 233.

Law Review Commentaries

- | | |
|--|--|
| Washington's new water rights law—improvements needed. 44 Wash.L.Rev. 85 (1968). | Water rights of non-Indian landowners within Indian reservations. Philip W. Dufford. 15 Gonz.L.Rev. 95 (1979). |
|--|--|

Library References

- | | |
|---|---|
| Waters and Water Courses ¶127.
WESTLAW Topic No. 405.
C.J.S. Waters § 157 et seq. | Loss of a water right, see Wash.Prac. vol. 1B, Barker and Scharf, § 58.23 et seq. |
|---|---|

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

90.14.010. Purpose

The future growth and development of the state is dependent upon effective management and efficient use of the state's water resources. The purpose of this chapter is to provide adequate records for efficient administration of the state's waters, and to cause a return to the state of any water rights which are no longer exercised by putting said waters to beneficial use.

Enacted by Laws 1967, ch. 233, § 1, eff. July 1, 1967.

Law Review Commentaries

- | | |
|---|---|
| Washington Water Resources Act as solution to problems under 1917 Water | Code; transferring consumptive riparian rights. 9 Gonz.L.Rev. 761 (1971). |
|---|---|

Notes of Decisions

In general 1

1. In general

Sections 90.03.010 et seq. and 90.14.010 et seq. were irrelevant to claim of easement by nonprofit corporation that

owned and maintained existing water supply system; water rights claims did not and could not involve property interest questions, as Department of Ecology had no authority to adjudicate private rights in land. *Crescent Harbor Water Co., Inc. v. Lyseng* (1988) 51 Wash.App. 337, 753 P.2d 555.

90.14.020. Legislative declaration

The legislature finds that:

(1) Extensive uncertainty exists regarding the volume of private claims to water in the state;

(2) Such uncertainty seriously retards the efficient utilization and administration of the state's water resources, and impedes the fullest beneficial use thereof;

(3) A strong beneficial use requirement as a condition precedent to the continued ownership of a right to withdraw or divert water is essential to the orderly development of the state;

(4) Enforcement of the state's beneficial use policy is required by the state's rapid growth;

(5) All rights to divert or withdraw water, except riparian rights which do not diminish the quantity of water remaining in the source such as boating, swimming, and other recreational and aesthetic uses must be subjected to the beneficial use requirement;

(6) The availability for appropriation of additional water as a result of the requirements of this chapter will accelerate growth, development, and diversification of the economy of the state;

(7) Water rights will gain sufficient certainty of ownership as a result of this chapter to become more freely transferable, thereby increasing the economic value of the uses to which they are put, and augmenting the alienability of titles to land.

Enacted by Laws 1967, ch. 233, § 2, eff. July 1, 1967.

90.14.030. Repealed by Laws 1969, Ex.Sess., ch. 284, § 23

Historical and Statutory Notes

The repealed § 90.14.030, which defined words and phrases in this chapter, was derived from Laws 1967, ch. 233, § 3.

See, now, § 90.14.031.

90.14.031. Definitions

Unless a different meaning is plainly required by the context, the following words and phrases as used in RCW 90.14.031 through 90.14.121 shall have the following meanings:

(1) "Person" shall mean an individual, partnership, association, public or private corporation, city or other municipality, county, or a state agency, and the United States of America when claiming water rights established under the laws of the state of Washington.

(2) "Beneficial use" shall include, but not be limited to, use for domestic water, irrigation, fish, shellfish, game and other aquatic life, municipal, recreation, industrial water, generation of electric power, and navigation.

Enacted by Laws 1969, Ex.Sess., ch. 284, § 12.

Historical and Statutory Notes

Severability—Laws 1969, Ex.Sess., ch. 284: See Historical and Statutory Notes following § 90.48.290.

Source: Laws 1967, ch. 233, § 3. Former § 90.14.030.

Notes of Decisions

In general 1

1. In general

Action may be maintained to quiet title to water rights acquired by appropri-

ation. *Barnes v. Belsaas* (1913) 73 Wash.205, 131 P. 817.

90.14.040. Repealed by Laws 1969, Ex.Sess., ch. 284, § 23

Historical and Statutory Notes

The repealed § 90.14.040, which related to claims of right to withdraw, divert, or use ground or surface waters, was derived from Laws 1967, ch. 233, § 4.

See, now, § 90.14.041.

90.14.041. Claim of right to withdraw, divert or use ground or surface waters—Filing statement of claim required—Exemptions

All persons using or claiming the right to withdraw or divert and make beneficial use of public surface or ground waters of the state, except as hereinafter provided in this section, shall file with the department of ecology not later than June 30, 1974, a statement of claim for each water right asserted on a form provided by the department. This section shall not apply to any water rights which are based on the authority of a permit or certificate issued by the department of ecology or one of its predecessors.

Enacted by Laws 1969, Ex.Sess., ch. 284, § 13. Amended by Laws 1988, ch. 127, § 73.

Historical and Statutory Notes

Laws 1988, ch. 127, § 73, substituted "ecology" for "water resources".

Severability—Laws 1969, Ex.Sess., ch. 284: See Historical and Statutory Notes following § 90.48.290.

Source:

Laws 1967, ch. 233, § 4.
Former § 90.14.041.

Notes of Decisions

Form of claims 1

1. Form of claims

Doctrine of substantial compliance could be used to meet requirements of Water Rights Act (§ 90.14.010 et seq.), which required all water rights claims to

be filed and recorded with state, where ranch's attempt to comply with the law failed only because it used wrong form, and form used was submitted to proper agency and contained all the information required by the correct form. Matter of Chumstick Creek Drainage Basin in Chelan County (1985) 103 Wash.2d 698, 694 P.2d 1065.

90.14.043. Claim of right to withdraw, divert or use ground or surface waters—Claim upon certification by board—Procedure—Cut-off date for accepting petitions

(1) Notwithstanding any time restrictions imposed by the provisions of chapter 90.14 RCW, a person may file a claim pursuant to RCW 90.14.041 if such person obtains a certification from the pollution control hearings board as provided in this section.

(2) A certification shall be issued by the pollution control hearings board if, upon petition to the board, it is shown to the satisfaction of the board that:

(a) Waters of the state have been applied to beneficial use continuously (with no period of nonuse exceeding five consecutive years) in the case of surface water beginning not later than June 7, 1917, and in the case of ground water beginning not later than June 7, 1945, or

(b) Waters of the state have been applied to beneficial use continuously (with no period of nonuse exceeding five consecutive years) from the date of entry of a court decree confirming a water right and any failure to register a claim resulted from a reasonable misinterpretation of the requirements as they related to such court decreed rights.

(3) The board shall have jurisdiction to accept petitions for certification from any person through September 1, 1985, and not thereafter.

(4) A petition for certification shall include complete information on the claim pursuant to RCW 90.14.051(1) through (8), and any such information as the board may require.

(5) The department of ecology is directed to accept for filing any claim certified by the board as provided in subsection (2) of this section. The department of ecology, upon request of the board, may provide assistance to the board pertinent to any certification petition.

(6) A certification by the pollution control hearings board or a filing with the department of ecology of a claim under this section shall not constitute a determination or confirmation that a water right exists.

(7) The provisions of RCW 90.14.071 shall have no applicability to certified claims filed pursuant to this section.

(8) This section shall have no applicability to ground waters resulting from the operations of reclamation projects.
Enacted by Laws 1979, Ex.Sess., ch. 216, § 4. Amended by Laws 1985, ch. 435, § 1.

Historical and Statutory Notes

Laws 1985, ch. 435, § 1, in subsec. (3), substituted "September 1, 1985" for "December 31, 1979".

See Historical and Statutory Notes following § 90.03.245.

Appropriations—Effective date—Severability—Laws 1979, Ex.Sess., ch. 216:

Library References

Health and Environment ¶25.7.
WESTLAW Topic No. 199.

C.J.S. Health and Environment §§ 106 to 114, 125 to 140, 150 to 157.

Notes of Decisions

Notice of extension 1

1. Notice of extension

In action over water rights, referee was not required to notify party of four-month extension for filing certain water rights claims since, as officer of superior court, it would have been improper for referee to advise one party in the proceeding how to improve its legal position to detriment of others. Matter of Chumstick Creek Drainage Basin in Chelan County (1985) 103 Wash.2d 698, 694 P.2d 1065.

Department of Ecology had no duty to publicize passage of this section providing four-month extension for filing certain water rights claims. Matter of Chumstick Creek Drainage Basin in Chelan County (1985) 103 Wash.2d 698, 694 P.2d 1065.

State's actions in not notifying ranch of four-month extension for filing certain water rights claims did not estop it from rejecting ranch's claims. Matter of Chumstick Creek Drainage Basin in Chelan County (1985) 103 Wash.2d 698, 694 P.2d 1065.

90.14.044. Existing water rights not impaired

The provisions of this 1985 amendatory act¹ authorizing the acceptance of a petition for certification filed during the period beginning on July 28, 1985, and ending on midnight, September 1,

EXHIBIT 5

DATE 2-17-95

SB 387

1985, shall not affect or impair in any respect whatsoever any water right existing prior to July 28, 1985.

Enacted by Laws 1985, ch. 435, § 2.

¹ Reviser's Note: "This 1985 amendatory act" consists of the enactment of RCW 90.14.044 and the 1985 c 435 amendment to RCW 90.14.043.

90.14.050. Repealed by Laws 1969, Ex.Sess., ch. 284, § 23

Historical and Statutory Notes

The repealed § 90.14.050, which related to the contents of a statement of claim of water rights, was derived from Laws 1967, ch. 233, § 5.

See, now, § 90.14.051.

90.14.051. Statement of claim—Contents—Short form

The statement of claim for each right shall include substantially the following:

- (1) The name and mailing address of the claimant.
- (2) The name of the watercourse or water source from which the right to divert or make use of water is claimed, if available.
- (3) The quantities of water and times of use claimed.
- (4) The legal description, with reasonable certainty, of the point or points of diversion and places of use of waters.
- (5) The purpose of use, including, if for irrigation, the number of acres irrigated.
- (6) The approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (3).
- (7) The legal doctrine or doctrines upon which the right claimed is based, including if statutory, the specific statute.
- (8) The sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

Except, however, that any claim for diversion or withdrawal of surface or ground water for those uses described in the exemption from the permit requirements of RCW 90.44.050 may be filed on a short form to be provided by the department. Such short form shall only require inclusion of sufficient data to identify the claimant, source of water, purpose of use and legal description of the land upon which the water is used: *Provided*, That the provisions of RCW 90.14.081 pertaining to evidentiary value of filed claims shall not apply to claims submitted in short form: *And provided further*, That claimants for such minimal uses may, at their option, file

statements of claim on the standard form used by all other claimants.

Enacted by Laws 1969, Ex.Sess., ch. 284, § 14. Amended by Laws 1973, 1st Ex.Sess., ch. 113, § 1, eff. April 20, 1973.

Historical and Statutory Notes

Laws 1973, 1st Ex.Sess., ch. 113, § 1, in the first sentence, inserted "substantially" and added the last paragraph.

Source:

Laws 1967, ch. 233, § 5.
Former § 90.14.050.

Severability—Laws 1969, Ex.Sess., ch. 284: See Historical and Statutory Notes following § 90.48.290.

90.14.060. Repealed by Laws 1969, Ex.Sess., ch. 284, § 23

Historical and Statutory Notes

The repealed § 90.14.060, which established procedures for filing and processing claims of water rights, was derived from Laws 1967, ch. 233, § 6.

See, now, § 90.14.061.

90.14.061. Statement of claim—Filing procedure—Processing of claim—Fee

Filing of a statement of a claim shall take place and be completed upon receipt by the department of ecology, at its office in Olympia, of an original statement signed by the claimant or his authorized agent, and two copies thereof. Any person required to file hereunder may file through a designated representative. A company, district, public or municipal corporation, or the United States when furnishing to persons water pertaining to water rights required to be filed under RCW 90.14.041, shall have the right to file one claim on behalf of said persons on a form prepared by the department for the total benefits of each person served; provided that a separate claim shall be filed by such company, district, public or private corporation, or the United States for each operating unit of the filing entity providing such water and for each water source. Within thirty days after receipt of a statement of claim the department shall acknowledge the same by a notation on one copy indicating receipt thereof and the date of receipt, together with the wording of the first sentence of RCW 90.14.081, and shall return said copy by certified or registered mail to the claimant at the address set forth in the statement of claim. No statement of claim shall be accepted for filing by the department of ecology unless accompanied by a two dollar filing fee.

Enacted by Laws 1969, Ex.Sess., ch. 284, § 15. Amended by Laws 1988, ch. 127, § 74.

Historical and Statutory Notes

Laws 1988, ch. 127, § 74, substituted "ecology" for "water resources".

Source:

Severability—Laws 1969, Ex.Sess., ch. 284: See Historical and Statutory Notes following § 90.14.290.

Laws 1967, ch. 233, § 6.
Former § 90.14.060.

90.14.065. Statement of claim—Amendment—Review of department of ecology's determination

Any person or entity, or successor to such person or entity, having a statement of claim on file with the water rights claims registry on April 20, 1987, may submit to the department of ecology for filing, an amendment to such a statement of claim if the submitted amendment is based on:

(1) An error in estimation of the quantity of the applicant's water claim prescribed in RCW 90.14.051 if the applicant provides reasons for the failure to claim such right in the original claim;

(2) A change in circumstances not foreseeable at the time the original claim was filed, if such change in circumstances relates only to the manner of transportation or diversion of the water and not to the use or quantity of such water; or

(3) The amendment is ministerial in nature.

The department shall accept any such submission and file the same in the registry unless the department by written determination concludes that the requirements of subsection (1), (2), or (3) of this section have not been satisfied. Any person aggrieved by a determination of the department may obtain a review thereof by filing a petition for review with the pollution control hearings board within thirty days of the date of the determination by the department. The provisions of RCW 90.14.081 shall apply to any amendment filed under this section.

Enacted by Laws 1987, ch. 93, § 1, eff. April 20, 1987.

90.14.070. Repealed by Laws 1969, Ex.Sess., ch. 284, § 23

Historical and Statutory Notes

The repealed § 90.14.070, which provided that failure to file a claim of water rights waived and relinquished those rights, was derived from Laws 1967, ch. 233, § 7.

Sec. now, § 90.14.071.

90.14.071. Failure to file claim waives and relinquishes right

Any person claiming the right to divert or withdraw waters of the state as set forth in RCW 90.14.041, who fails to file a statement of

claim as provided in RCW 90.14.041, 90.14.051 and 90.14.061, shall be conclusively deemed to have waived and relinquished any right, title, or interest in said right.
Enacted by Laws 1969, Ex.Sess., ch. 284, § 16.

Historical and Statutory Notes

Source:

Laws 1967, ch. 233, § 7.
Former § 90.14.070.

Severability—Laws 1969, Ex.Sess., ch. 284: See Historical and Statutory Notes following § 90.14.290.

Library References

Loss of a water right, water right claims registration, see Wash.Prac. vol. 1B, Barker and Scharf, § 58.26.

Notes of Decisions

Compensation 1

I. Compensation

Provision of this section, which provides that any person who fails to file statement of water rights claim was conclusively deemed to have waived and

relinquished right, did not operate to effect a taking or damaging of property for public use, and thus no compensation was required for waiver and relinquishment of unclaimed water rights. Matter of Chumstick Creek Drainage Basin in Chelan County (1985) 103 Wash.2d 698, 694 P.2d 1065.

90.14.080. Repealed by Laws 1969, Ex.Sess., ch. 284, § 23

Historical and Statutory Notes

The repealed § 90.14.080, which stated that the filing of a claim of water rights was not deemed a final adjudication of those rights, was derived from Laws 1967, ch. 233, § 8.

Sec. now, § 90.14.081.

90.14.081. Filing of claim not deemed adjudication of right—Prima facie evidence

The filing of a statement of claim does not constitute an adjudication of any claim to the right to use of waters as between the water use claimant and the state, or as between one or more water use claimants and another or others. A statement of claim filed pursuant to RCW 90.14.061 shall be admissible in a general adjudication of water rights as prima facie evidence of the times of use and the quantity of water the claimant was withdrawing or diverting as of the year of the filing, if, but only if, the quantities of water in use and the time of use when a controversy is mooted are substantially in accord with the times of use and quantity of water claimed in the statement of claim. A statement of claim shall not otherwise be evidence of the priority of the claimed water right.

Enacted by Laws 1969, Ex.Sess., ch. 284, § 17.

Historical and Statutory Notes

Source:

Laws 1967, ch. 233, § 8.
Former § 90.14.081.

Severability—Laws 1969, Ex.Sess.,
ch. 284: See Historical and Statutory
Notes following § 90.48.290.

90.14.090. Repealed by Laws 1969, Ex.Sess., ch. 284, § 23

Historical and Statutory Notes

The repealed § 90.14.090, which established definitions for and the form of a water rights notice, was derived from Laws 1967, ch. 233, § 9.

Sec. now, § 90.14.091.

90.14.091. Definitions—Water rights notice—Form

For the purpose of RCW 90.14.031 through 90.14.121 the following words and phrases shall have the following meanings:

(1) "Statement of taxes due" means the statement required under RCW 84.56.050.

(2) "Notice in writing" means a notice substantially in the following form:

WATER RIGHTS NOTICE

Every person, including but not limited to an individual, partnership, association, public or private corporation, city or other municipality, county, state agency and the state of Washington, and the United States of America, when claiming water rights established under the laws of the state of Washington, are hereby notified that all water rights or claimed water rights relating to the withdrawal or diversion of public surface or ground waters of the state, except those water rights based upon authority of a permit or certificate issued by the department of ecology or one of its predecessors, must be registered with the department of ecology, Olympia, Washington not later than June 30, 1974. FAILURE TO REGISTER AS REQUIRED BY LAW WILL RESULT IN A WAIVER AND RELINQUISHMENT OF SAID WATER RIGHT OR CLAIMED WATER RIGHT. For further information contact the Department of Ecology, Olympia, Washington, for a copy of the act and an explanation thereof.

Enacted by Laws 1969, Ex.Sess., ch. 284, § 18. Amended by Laws 1988, ch. 127, § 75.

Historical and Statutory Notes

Laws 1988, ch. 127, § 75, substituted "ecology" for "water resources".

Severability—Laws 1969, Ex.Sess.,
ch. 284: See Historical and Statutory
Notes following § 90.48.290.

Source:
Laws 1967, ch. 233, § 9.
Former § 90.14.090.

90.14.100. Repealed by Laws 1969, Ex.Sess., ch. 284, § 23

Historical and Statutory Notes

The repealed § 90.14.100, which related to requirements for giving notice of chapter provisions requiring filing of claim of water rights, was derived from Laws 1967, ch. 233, § 10.

Sec. now, § 90.14.101.

90.14.101. Notice of chapter provisions—How given—Requirements

To insure that all persons referred to in RCW 90.14.031 and 90.14.041 are notified of the registration provisions of this chapter,¹ the department of ecology is directed to give notice of the registration provisions of this chapter as follows:

(1) It shall cause a notice in writing to be placed in a prominent and conspicuous place in all newspapers of the state having a circulation of more than fifty thousand copies for each week day, and in at least one newspaper published in each county of the state, at least once each year for five consecutive years.

(2) It shall cause a notice substantially the same as a notice in writing to be broadcast by each commercial television station operating in the United States and viewed in the state, and by at least one commercial radio station operating from each county of the state having such a station regularly at six month intervals for five consecutive years.

(3) It shall cause a notice in writing to be placed in a prominent and conspicuous location in each county court house in the state.

(4) The county treasurer of each county shall enclose with each mailing of one or more statements of taxes due issued in 1972 a copy of a notice in writing and a declaration that it shall be the duty of the recipient of the statement of taxes due to forward the notice to the beneficial owner of the property. A sufficient number of copies of the notice and declaration shall be supplied to each county treasurer by the director of ecology before the fifteenth day of January, 1972. In the implementation of this subsection the department of ecology shall provide reimbursement to the county treasurer for the reasonable additional costs, if any there may be, incurred by said treasurer arising from the inclusion of a notice in writing as required herein.

SENATE AGRICULTURE

EXHIBIT NO. 6DATE 2-17-95BILL NO. SB 38702/09/93
PAGE 1

RQIXLT

LATE CLAIM INDEX
INDEX BY DATE RECEIVED

WATER RIGHT ID	USE	FLOW RATE	RECVD	YEAR	POINT OF DIVERSION SEC SEC TWP RGE CN TRIB	SOURCE NAME	OWNER NAME	
39FJ-W-173309-00	DM	25.00	G	811023	1950	W2NENW30 03N 60E FA	WELL	WOLENETZ, MELVIN & SONS INC
76H-W-214050-00	IR	.40	C	820216	1885	NWSENE32 03N 20W RA	LOWMAN CREEK	RECHT ROBERT F
								RECHT SHARON L
								WALLACE LEONARD O
								WALLACE PAMELA J
3 43Q-W-208800-00	ST			820303	1942	N2 1 01S 23E YE	CANYON CREEK	BEZYACK KEVIN
								BEZYACK GALE
								DUKE HUGH R
								DUKE MARY E
4 400-W-170756-00	ST			820404	1964	NWNWSE28 26N 35E VA	UT LONE TREE CREEK, MIDDLE FORK	ETCHART MARK
								ETCHART MITCHEL
5 41U-W-096814-00	IR	30.00	G	820430	1973	SWSWNW 2 16N 04W LC	WELL	CURRAN D MICHAEL
6 76H-W-152026-00	DM			820430	1959	SWSENE 3 01N 20W RA	LAIRD CREEK	NEELY LARRY L
								NEELY JOAN F
76F-W-092139-00	DM			820501	1964	NWSWSW35 15N 09W LC	GLADYS TILTON	ANDERSON KAREN
								ANDERSON TIM J
76F-W-092140-00	DM	5.00	G	820501	0000	NWSWSW35 15N 09W LC	WELL	ANDERSON KAREN
								ANDERSON TIM J
41P-W-134164-00	ST	2.00	C	820501	1911	SESWSW34 35N 06E LI	COTTONWOOD COULEE, BRANCH OF	FRANK ETHAL
40G-W-141848-00	ST			820501	1951	NWSWNW22 37N 06E LI	UT LAIRD CREEK	SAGE CREEK COLONY
76LJ-W-152165-00	DM	5.00	G	820501	1968	26 29N 20W FL	WELL	NICHOLS PAUL F
41Q-W-152658-00	ST	.17	G	820501	1890	NENESE 2 23N 06E CH		ARGANBRIGHT FARMS
								ARGANBRIGHT EARL R
410-W-152659-00	FW			820501	1925	NWSWNW27 24N 07E CH	EIGHTMILE COULEE	ARGANBRIGHT FARMS
								ARGANBRIGHT EARL R
41M-W-155360-00	IR	3.50	C	820501	1910	SESWNE23 31N 10W GL	TWO MEDICINE RIVER	MANLEY WILLIAM F
41R-W-155719-00	ST	1.00	G	820501	1909	SWSENE12 22N 10E CH		GOLDHAHN, JR HAROLD H
41R-W-155720-00	DM	5.00	G	820501	1953	NWNENE12 22N 10E CH	WELL	GOLDHAHN, JR HAROLD H
41P-W-156286-00	ST	7.50	C	820501	1930	NWNE31 31N 02E TO	UT CLOSED BASIN	BENJAMIN LESLIE W
								BENJAMIN ANN E
41Q-W-156440-00	ST	2,790.00	G	820501	1915	SWSW33 20N 08E CH	LITTLE WILLOW CREEK	NELSON ETHEL E
41P-W-157417-00	ST	1.20	C	820501	1928	SWNESE22 32N 03W TO	UT MEDICINE ROCK COULEE	HASQUET JAMES
								HASQUET PRAIRIE CO
								KASSEL, LYLE ESTATE OF
								SHANE, MARY E ESTATE OF
								BLIXT JOHN E
								BLIXT HELEN H
								KASSEL CATHERINE R
								MOORE GERALDINE J
20 41P-W-157418-00	ST	.82	C	820501	1932	NESENE13 32N 03W TO	UT MEDICINE ROCK COULEE	HASQUET JAMES E
								HASQUET PRAIRIE CO
								KASSEL, LYLE ESTATE OF
								SHANE, MARY E ESTATE OF
								BLIXT HELEN H
								BLIXT JOHN E
								KASSEL CATHERINE R
								MOORE GERALDINE J
41P-W-157419-00	ST	1.10	C	820501	1929	SWNESE15 32N 03W TO	UT MEDICINE ROCK COULEE	HASQUET JAMES E
								HASQUET PRAIRIE CO
								KASSEL, LYLE ESTATE OF
								SHANE, MARY E ESTATE OF

The original of this document is stored at
the Historical Society at 225 North Roberts
Street, Helena, MT 59620-1201. The phone
number is 444-2694.

Feb. 16, 1995 DATE 2-17-95BILL NO. SB 387

Patty Walker
Atlasta Ranch
Box 320081
Glen, Montana 59732

To whom it may concern,

I come here today because I have a late claim and I want you to know what has happened to my family because of it. My husband and I bought our place in 1987, it is an old homestead and mostly rock and sagebrush. We did not get up one morning and decide that today we were going to file a water claim late. No the homesteader in 1910 got up one morning and went out with his shovel and dug out the spring and started to use the water on what is our place today. Our predecessor for whatever reason missed filing on this spring, and we have filed a late claim. This water has been in continuous use since 1910. Because of our late claim the Bureau of Land Management has decided that it wants our water, not because it needs water but because it felt that we no longer had any right to it. We have been taken in front of a water hearing and had to defend our historic water rights. The BLM lost but the hearing examiner left the door wide open for them to try again to take our water away. This was before Sen. bill 310 was passed. Then in 1992 we were cleaning out our spring when an armed BLM ranger came and tried to stop us from maintaining our spring. I have to say that every time we have tried to do any work on our spring the BLM has interfered with threats and intimidation. The last threat was our invitation to federal court in 1992. Judge Hatfield last month ruled that we as the defendants were guilty and had to prove ourselves innocent. That we after three owners and forty years, that we as the defendants had the burden of proof. And with that after he had the case for two years instead of giving the BLM what it had asked for, he gave the BLM our entire ranch. The BLM will stop at nothing to take our water away from us because of this late claim and because we will not sign our water rights over to them. We are awaiting our third invitation to defend ourselves and our water in court. Our BLM file says that the BLM intends to protest every single water right that originates on public land. That will be our forth invitation to court brought by the BLM.

All of this has happened in the eight years that we have had this place. All we want is to be left alone and live in peace and enjoy this place as our predecessors did. This has destroyed my life, my husbands life and my two sons lives. My husband has had to be put on medication because of the depression all of this has caused and I can't begin to tell you what it does to me when my 11 year old son for christmas the first thing on his list is for the government to leave us alone. Maybe there is nothing you can do to stop what is happening to us but PLEASE, please do something

so that no other family has to go through what mine has.

Several years ago the legislature passed a law saying that for something as minor as a filing mistake historic rights would vaporize without even a chance to explain. I am asking you to make it right.

Sincerely,

Patty Walker
Patty Walker

SENATE AGRICULTURE
EXHIBIT NO. 8
DATE 2-17-95
BILL NO. SB 387

Amendment to Senate Bill 387
First Reading Copy

Prepared by Holly Franz
February 17, 1995

1. Page 7.

Following: line 23

Insert: "(8) The provisions of subsection (7) do not apply to issues arising after entry of the previous decree, including but not limited to abandonment, expansion of the water right, and reasonable diligence.

Senate Agriculture Committee

SB 387 Hearing

EXHIBIT NO. 9

DATE 2-17-95

BILL NO. SB 387

I am Echo Harberg of Whitetail and I would like to explain the situation our family is now facing because of the Supreme Court's decision regarding "late filed" water rights. We now face the prospect of having a water right which may be worthless because of the priority date we will now receive. Our original claims were filed in the early 1900's, among the very first in Northwestern Montana. The law firm that prepared nearly thirty first time claims for my mother in 1982, did not file the claims for flood irrigation purposes because they had already been filed. When my mother discovered that they had not been filed, she had an employee at the Glasgow office assist her with the claims - but this was in November, 1982 - six months after the designated deadline.

My mother died in 1987 and we became owners of the land and the water rights, and have since changed the method of irrigation to a system of diked. This project covered many acres and has cost a lot of money. Even if our water rights are not considered forfeited, a priority date which would be later than all other "timely" filed rights in our basin would make our rights junior to all the other rights and probably worthless.

Because a re-filing deadline date chosen by the Legislature was missed, these rights, which were legally appropriated, filed and used starting over ninety years ago, must now be considered junior to many other filed just a few years ago.

Our family would appreciate any consideration you can give us as "late filed".

Thank you,
Echo Harberg

SB 387

Mr Chairman, Members of the Committee:

For the record, I am Dan Andrews, President of the Greenfield Irrigation District. G.I.D. would like to go on record as opposing SB 387.

The first concern is on page 6, item marked (b). G.I.D. feels this should be more defined, or is it the intent to exclude the United States Government as a objector to certain water rights.

The second concern is on page 7, sub-section 7. The Montana State Legislator enacted a law that said all water rights will be adjudicated. A procedure was set up to provide an objector a right be heard. It seems this section's intent is to limit who can object, and what they can object to. The adjudication process is well under way. Why change the rules after the game has started?

Greenfield Irrigation District will submit, at a later date, more testimony on SB 387.



United States Department of the Interior

OFFICE OF THE SOLICITOR

P.O. Box 31394

Billings, Montana 59107-1394

February 17, 1995

Harley Harris
Montana Attorney Generals Office
Justice Building
Helena, MT 59620

Dear Mr. Harris:

Re: Senate Bill 387

Senate Bill 387, a bill concerning late claims, objections and an advisory committee was introduced on Monday and we understand that a hearing on the Bill is scheduled for Friday, February 17, 1995 before the Senate Agriculture and Livestock Committee.

The United States Department of Interior has several concerns with the various sections of SB 387.

Section 1 - Commencement of action - Subsection (3) creates a situation where the parties to the Montana Adjudication never will know, until possibly a final decree, who are the parties to the adjudication and what are the extent of their water rights. The Montana Adjudication already is 13 years old and the vague estimates of completion go well into the next century. The bastions of judicial decrees, finality and predictability, are set aside by this amendment to afford a cafeteria style approach to participation. Such an amendment to the Adjudication statute may seriously compromise the status of Montana's comprehensive adjudication under the McCarran Amendment, 43 USC § 666.

Section 2 - Amending 85-2-221 - Subsection (3)(b) effectively removes finality from the adjudication process. Subpart (c) ignores the reliance of negotiating parties to compact settlements dated later than July 1, 1993. The Department of the Interior believes that the amendment renders its expectations and reliance on the provisions of the just completed National Park Service Compact illusory with respect to basin closure and subordination to the existing level of water use. In addition, Interior still has the same concerns voiced in the last legislative session on SB 310 and to the interim legislative committee studying late claims. Subpart (e) merely creates an additional burden upon parties to argue more issues before the Water Courts.

Section 5 - Advisory Committee - We are concerned with the limitations on committee size provided in subsection (2)(b). Such limitations in size can only create an appearance of bias or discrimination to those not represented. Further, the attendance

of "ex officio" members from the Attorney General's office and the Department of Natural Resources and Conservation create the possibility that the interests of the United States and Indian Tribes will not be seriously considered.

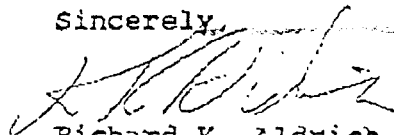
Section 6 - Hearing on Temporary Preliminary or Preliminary Decree - Subsection (1)(b) is a rather blatant attempt to limit objections. The result of this amendment will be additional pre-hearings to determine if "good cause" has been shown. Subsection (3) will have the result of eliminating most persons who want to object, but do not want to hire an attorney or a consultant. Additional time will be needed to review statements and then to challenge them. Again the result will be that fewer objections will be filed. Subsection (7) is a well disguised attempt to prevent objections to claims that purport to represent previous water decrees. Since the McCarran amendment is the first vehicle for including the United States in a decree, the United States will be adversely affected by this amendment. We believe such an amendment compromises the Montana Adjudication and creates the possibility of a challenge to the Adjudication on jurisdictional grounds.

Section 7 - Appeals - Subsection (2) appears to negate the traditional authority of judges to determine whether an issue should be certified as final so that an appeal to the Supreme Court can be made. We find no basis for this departure from the Rules of Civil Procedure.

The Department of Interior believes that the major portions of this bill are unwise or not needed. Last session, the late claim issues were raised and addressed by the Legislature. A legislative oversight committee held hearings and concluded that changes in the 1993 legislation were not needed. We agree with the committee.

Please contact our office if you have any questions.

Sincerely,



Richard K. Aldrich
Field Solicitor

cc: Joe Mazurek, Attorney General
Don McIntyre, DNRC
Susan Cottingham, Compact Commission
Matthew Williams, Esq.

SB 387

PROPOSED AMENDMENTS

RESERVED WATER RIGHTS COMPACT COMMISSION

February 17, 1995

Page 2, line 22: ²³

Strike: "prior to July 1, 1993"

Page 3, line 9: ¹⁰⁻¹¹

Strike: "that is ratified by the legislature prior to July 1, 1993"

Insert: "after the date specified in a compact"

Page 3, line 12: ¹⁴

Add after "law": "; or be decreed as senior to a water right recognized in the compact"

Text with proposed amendments:

Page 2, lines 21-24:

"Accordingly, with respect only to a basin that has not been closed to further appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter, a claim of an existing water right not filed with the department on or before April 30, 1982, may be filed with the department on forms provided by the department."

Page 3, lines 8-12:

"(c) a person filing a late claim does not have the right or standing to object to any water rights compact reached in accordance with part 7 of this chapter **after the date specified in a compact**, except to the extent that right or standing to object exists based on a claim of water right filed on or before April 30, 1982, or to claim protection for the right represented in the late claim under any provision of a compact that subordinates the use of a water right recognized in the compact to a right recognized under state law; **or be decreed as senior to a water right recognized in the compact**"

40

SB 387

TESTIMONY OF -- ON BEHALF OF
THE RESERVED WATER RIGHTS COMPACT COMMISSION

February 17, 1995

The following testimony addresses only the impact of SB 387 on compacts between the State and federal and Tribal governments settling water rights. It does not address the broader implications of the impact of SB 387 on the adjudication or the exposure of the State to takings claims.

SB 387 adversely impacts compacts in two ways:

- (1) language in SB 387 is in direct conflict with SB 203, the compact between the State and the National Park Service settling water rights for the Little Bighorn Battlefield National Monument and Bighorn Canyon National Recreation Area which was passed by the Senate on a 50-0 vote and now awaits executive action in the House Natural Resources Committee; and
- (2) open ended late claim filing will jeopardize negotiation of future compacts by creating uncertainty in the status of water allocation in the affected basin.

#1 Conflict with SB 203:

SB 387 states on page 2, lines 21-24:

Accordingly, with respect only to a basin that has not been closed to further appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter **prior to July 1, 1993**, a claim of an existing water right not filed with the department on or before April 30, 1982, may be filed with the department on forms provided by the department.

SB 203 requires closure of drainages flowing into Bighorn Canyon National Recreation Area. Agreement concerning level of development allowed prior to closure was based on evaluation of existing claims. The 1993 date in SB 387 is in direct conflict with SB 203.

Remedy: remove "prior to July 1, 1993" from line 22

SB 387 states on page 3, lines 8-9:

a person filing a late claim does not have the right or standing to object to any water rights compact reached in accordance with part 7 of this chapter **that is ratified by the legislature prior to July 1, 1993 . . .**

SB 203 (Article II, Section C.2), page 10, lines 9-15 states:

The reserved water rights described in the Compact shall not be subordinate to water rights which were forfeited by 85-2-212 as interpreted in In the Matter of the Adjudication of the Water Rights within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), nor shall any claimant of such forfeited water right have standing, based solely on such claimed right, to object to this Compact or any reserved water right described in this Compact . . .

This language is in direct conflict. It is likely that in statutory interpretation the more specific law, SB 203, would control. However, by not amending the language in SB 387, that decision is left to the discretion of a court. By amending SB 387 the legislature retains control of interpretation of its intent and prevents the risk of forcing re-negotiation of SB 203.

Remedy: replace "that is ratified by the legislature prior to July 1, 1993" on page 3 line 9, with: "after the date specified in a Compact"

#2 Future Compacts:

Negotiation of compacts focuses on allocation of water between federal and Indian rights and State-based rights. The DNRC database on filed and decreed rights and permits forms the basis for identification of State uses that require protection. SB 387 allows late claims to be filed at any time. State negotiators will lack certainty in the level of water use which must be protected, and federal and Tribal negotiators will be unlikely to agree to subordinate to existing use when that level of use is uncertain. For this reason, it is insufficient to replace the July 1, 1993 date discussed above with July 1, 1995. The more general remedies set forth above are necessary. In addition, the following amendment will assure negotiators that new claims will not be granted seniority after a compact is ratified:

Remedy: Page 3, line 12:

Add after "law": "; or be decreed as senior to a water right recognized in the compact"

Amendments to Senate Bill No. 389
First Reading Copy

Requested by Fish, Wildlife and Parks
For the Committee on Agriculture

Prepared by Paul Sihler
February 15, 1995

1. Page 2, line 30.
Strike: "farm"

2. Page 4, line 8.
Following: "that"
Insert: "within 30 days of importation or prior to January 1 of
each year

3. Page 5, line 5.
Strike: "and"
Insert: ", "
Following: "sex"
Insert: ", and individual identification numbers"

~~4.~~
5. Page 6, line 20.
Following: "of"
Insert: "game farm"

NAME Mons Teigen

ADDRESS 19 Cloverview Helena

HOME PHONE 442-4835 WORK PHONE _____

REPRESENTING Teigen Lard & L.S. Co

APPEARING ON WHICH PROPOSAL? SB 381

DO YOU: SUPPORT _____ OPPOSE _____ AMEND _____

COMMENTS:

Supports Jan Rehberg's statement

WITNESS STATEMENT

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE Feb. 17, 1995

SENATE COMMITTEE ON Agriculture

BILLS BEING HEARD TODAY: SJR 17, SB 387, SB 394

Executive Action SJR 17, SB 387, SB 394, SB 389

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Don Andrews	Greenfield Irrigation	387		✓
James Krause	Greenfield Irrigation	387		✓
George L. Mellinger	Greenfield Irrigation	387		✓
Victor W. Krueger	Self	387	Yes	~~Oppose~~
Eugene Morley	Flat Creek Basin	387	✓	
Mona Teiger	Teiger L & L Co	387	✓	
Stan Fresier	Self	394	X	~~X~~
Stan Fresier	Self	SJ17		X
Chris Tweeten	AG & ^{Per. water Rights} ~~Conserv~~ Comm'n	387		✓ unless amended
Bob Helbert	MT workprowers	^{SB} 394	~~Yes~~ ~~Oppose~~	~~Oppose~~
Russ BARRETT	FT. SHAW IRR. DIST	387		✓
DON ROSE	FT. SHAW IRR. DIST.	387		✓
Jim Prichard	MWF	SJ17		✓
Janet Ellis	MT Audubon	^{SB 387} SJ17		✓

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE Feb. 17, 1995

SENATE COMMITTEE ON Agriculture

BILLS BEING HEARD TODAY: SJR 17, SB 387, SB 394 &

Executive Action SJR 17, SB 387, SB 394, SB 389

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Patty Walker	Self	387	X	
Joe J. Kleinsasser	Martinsdale Colony	387	X	
Walt Wipf	Martinsdale Colony	387	✓	
Lorna FRANK	Mt. Farm Bureau	SJR-17 SB 394	✓	
Zyle Richards	Self self	387	✓	
Joe T. Helle	Self	394	✓	
John Blomquist	Mt. Stockgrowers	394	✓	
Larry Brown	Ag Pres. Assoc.	394	✓	
Jay Chamberlin	Self	394	✓	
Jay Chamberlin	Self	387		✓
Paul J. Wipf	Self	387	✓	
John Blomquist	Mt. Stockgrowers	387	✓ Sects 5-8	
Cliff Cox	Self	387	✓	
Harley Harris	AB	387		

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE Feb. 17, 1995

SENATE COMMITTEE ON Agriculture

BILLS BEING HEARD TODAY: STR 17, SB 387, SB 394, &

Executive Action STR 17, SB 387, SB 394, & SB 389

< ■ >

PLEASE PRINT

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Check One

Name	Representing	Bill No.	Support	Oppose
Lorna Frank	Mt. Farm Bureau	SB 387		✓
Isabel D. Cox	Self	SB 387	✓	
Holly Franz	Mt. Power Co	SB 387	✓ Advisory Council	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

SENATE JUDICIARY

Page 12

- BILL NO - REFERRED - HEARING - OTHER CONSIDERATION DATES - EXECUTIVE ACTION/DATE/VOTE - REREFERRED - DATE READ

	2/06	2/09		TABLED ON 02/09	VOTE:		
SB0316	BISHOP, AL		PROVIDE DUI SENTENCING ENHANCEMENT FOR DUI	2/14			
	2/07	2/15		DO PASS	VOTE:		2/15
SB0318	BENEDICT, STEVE		ESTABLISH STATUTE OF LIMITATIONS FOR ACCOUNTANT'S NEGL & BREACH OF CONTRACT				
	2/07	2/13		TABLED ON 02/14	VOTE:		
SB0333	BISHOP, AL		REVISE PROBATIONARY DRIVER'S LICENSE PROCEDURES UNDER DUI LAWS	3/15			
	2/08	2/15		DO PASS	VOTE:		2/15
SB0340	CRIPPEN, BRUCE		AUTHORIZE LIMITED LIABILITY PARTNERSHIPS	2/16			
	2/09	2/16		PASS AS AMENDED	VOTE:		2/18
SB0342	BARTLETT, SUE		LOCATE LAW ENFORCEMENT ACADEMY IN HELENA				
	2/09				VOTE:	FINANCE & CLAIMS	
SB0350	VAN VALKENBURG, FRED		EMPLOYER NOTICE OF THEFT FROM EMPLOYER BY PROBATIONER OR PAROLEE	2/15			
	2/10	2/15		DO PASS	VOTE:		2/15
SB0353	HALLIGAN, MIKE		REVISE GUARDIAN AD LITEM IN FAMILY MATTERS/SPECIAL MASTERS IN CRIMINAL CASES	2/13			
	2/10	2/13		PASS AS AMENDED	VOTE:		2/13
SB0387	BECK, TOM		CLARIFY WATER RIGHTS ADJUDICATION; EXPAND THE WATER CLAIM APPEAL PROCESS	3/16			
	2/27	3/04	3/4 SUB	PASS AS AMENDED	VOTE:		3/07
SB0402	ECK, DOROTHY		MEDICAL SUPPORT ORDERS IN DIVORCE AND OTHER PROCEEDINGS	2/16			
	2/15	2/16		PASS AS AMENDED	VOTE:		2/18
SJ0003	BENEDICT, STEVE		ASSERT STATES RIGHTS	1/17			
	1/02	1/10		PASS AS AMENDED	VOTE:		1/17
SJ0006	BROWN, BOB		LEGISLATURE'S SUPPORT OF AND INTENT FOR THE CONFERENCE OF THE STATES	2/8			
	1/23	2/07		PASS AS AMENDED	VOTE:		2/09
SJ0007	DOHERTY, STEVE		LEG AUDITOR TO DO PERFORMANCE AUDIT OF SUPREME CRT ADMIN OFF/CERTAIN SYSTEMS	2/15			

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MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN BRUCE CRIPPEN, on March 2, 1995, at
9:00 A.M.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Feland, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 158, HB 161, HB 250, SB 387
Executive Action: HB 135, HB 83, HB 46, HB 69, HB 177, HB
179, HB 250, HB 161

{Tape: 1; Side: A; Approx. Counter: 00}

EXECUTIVE ACTION ON HB 135

Motion: SENATOR MIKE HALLIGAN MOVED THAT HB 135 BE CONCURRED IN.

Discussion: SENATOR LARRY BAER said he had a lot of problems
with the bill, speaking mostly to government bureaucracy. He
said they would not need two attorneys, a paralegal and a
secretary. He maintained that they were not that complicated and

minimal impact. The problem is they were basing their figures on the old law. He said the bill had value beyond that because of deterrents.

Closing by Sponsor:

REPRESENTATIVE CURTISS said she had served on a Task Force on Child Pornography headed in Kalispell. The acts committed on children are unspeakable, she said. The amendments relative to the electronic media were put on by REPRESENTATIVE KOTTEL in committee and she concurred with those. She stated that effecting the changes and increasing the penalty should give law enforcement officials an incentive to accelerate their efforts to prosecute these cases. Only by providing strong deterrents are we going to discourage those corrupt persons in our society who have no qualms about preying on the innocent to line their own pockets. She urged favorable consideration and concurrence.

HEARING ON SB 387

Opening Statement by Sponsor:

SENATOR TOM BECK, Senate District 28, Deer Lodge, sponsored SB 387. He stated he was trying to accomplish three things with this bill that he had presented before: 1) The bill would rectify the late claims process that had gotten out of sync. In 1983 Montana started to re-adjudicate the waters to protect the water holders in Montana, but when some were not in the process on a certain date, they were thrown out as adjudicated water rights. It was his desire to let some of those claims back in the adjudication process. It was not his intent to interfere with any compacts or with the McCarren decision, but to try to get waters already adjudicated in the court system back in the process. 2) The second part would address litigation currently going on with water rights claims. One farmer in his area had spent up to \$60,000 protecting the rights he had adjudicated from other people trying to claim those rights. The sponsor said he was trying to expedite that process. Why not put the already adjudicated water rights into the temporary, preliminary decree, or those that had already gone through the courts? 3) The final part would form a committee to work in conjunction with the water courts to see if there were things they could do to expedite the adjudication process. They had been working on this for 15 years already, and projections were for 20-25 more years to complete it.

Proponents' Testimony:

Janice Rehberg, attorney, partner of Crowley, Haughey, Hanson, Toole and Dietrich, spoke on her own behalf and also represented Teigen Land and Livestock. She told the committee she had been involved in an issue with this bill for the past five years. She worked on two issues: 1) the late claims aspects, and 2) the advisory committee. She stated that she had attempted to develop

a proposal that would be legally sound, equitable, efficient, cost effective and would provide some finality to the on-going debate as to what should be done with late claims. If not addressed, she feared it would continue to haunt the legislature for years to come. She acknowledged the complexity of the issue, noting the interests, concerns and legal issues, leading her to believe it was an issue to be decided by the court, the arbiter of justice. The issues would require a particularized inquiry in to the facts and circumstances of the case, she said. She encouraged the formation of an advisory committee to speed up the process and to provide justice at a reasonable cost.

Patty Walker, Glen, represented herself. She read from written testimony. (EXHIBIT 10)

Cliff Cox, rancher from Broadwater County, represented himself. He stated that he was a late claimant and also a timely claimant. He supported HB 387, but had concerns he wanted the committee to address. He was concerned that the timeliness and interpretation of the adjudication process is maintained after the passage of the bill, meaning that he wanted to ensure that the passage was not challenged by the federal government. The advisory committee should remain on an advisory capacity, he stated. Mr. Cox said he was also sensitive to the concerns of the timely filing complainants be protected, but felt that the issue of continuous use of late claims must be addressed. He offered assistance to the committee.

Holly Franz, representing the Montana Power Company, testified concerning Sections 5 and 6 of the bill. Section 5 creates an advisory committee for the water court. Attorneys had discussed this in the past with Judge Loble and he had been generally supportive of the idea. This would be a good way to address the concerns of the water courts to identify improvements that could be made. She addressed the issues contained in Section 6, Page 7, Section, 7, Line 15. In non-legislative times, Ms. Franz represents the firm of Gough, ShannaHan, Johnson and Waterman and she said she represented a number of water claimants, including irrigators and other water users. Very often issues arise concerning decreed water rights. She stated she was currently working on an adjudication in the Sun River country where a decree had been in place since 1906, but concerns had been raised in the adjudication that the language as written would be harmful. The old decrees are not particularly detailed about the acreage actually irrigated at the time of the decree. Consequently, there were a number of claims being objected to because of claims that the acreage has been expanded significantly since the decree. Another issue that commonly arises with a decreed water right is that of abandonment. They may have been irrigating in 1906, but stopped in 1920, she said. She submitted an amendment (EXHIBIT 11) which would keep in the language of Section 7, which is a codification of the legal doctrine of *res judicata*, but makes it clear that the court can consider the issues that have arisen after entry of the previous

decree, such as abandonment or expansion of acres or the failure to use due diligence in putting irrigated acres to use. With the amendment, she would support the section, she stated.

John Bloomquist, representing the Montana Stockgrowers Association, is a water attorney from Dillon. He stated that they also have offices in Helena, and participate in the water adjudication process. The Association supports the adjudication process and the need to quantify and establish the parameters and elements of existing water rights in Montana. He spoke of Sections 5-7. In terms of late claims, he said his organization had people on both sides of the fence. If there was a way to expand forfeiture remission in a manner which does not compromise the integrity of the adjudication process, that would be the challenge of the committee, he said. They believe a review of the water court rules as well as the DNRC verification and examination rules could be beneficial in streamlining the process and expediting the adjudication of the existing water rights. He suggested the possible amendment of requiring a district judge be added to the advisory council to serve as a water division judge. He concurred in Ms. Franz' amendment regarding the enlargement and abandonment issues. On Page 7, Line 15, he suggested the word, "shall," be changed to, "may", to allow the court discretion in addressing a petition for dismissal of the objection. Section 7 regarding the allowance of appeals of legal issues they thought was a good idea. He said it was an extended codification of Rule 54 certification, making clear on some of the legal issues of interlocutory decrees that the availability of the Supreme Court is there. He said it was important to note that temporary preliminary decrees, while interlocutory in nature, (after objections have resolved) will be enforceable.

Larry Brown, represented the Agricultural Preservation Association. He wished to echo the comments by Mr. Bloomquist and Ms. Franz regarding Line 15, Section 7. His organization felt they would be better served to replace, "shall," with "may," to give the participants a better opportunity to deal with that issue. A water right is an asset of private property, he said, and they believed it deserved the due process as could be seen in the courts.

Opponents' Testimony:

Mark Simonich, Director, Department of Natural Resources and Conservation, spoke on behalf of the Department and the Administration, in opposition to SB 387. He read from written testimony. (EXHIBIT 12)

Harley Harris, Assistant Attorney General, State of Montana, representing Joe Mazurek, stated that the Attorney General concurred in the testimony presented by Mr. Simonich on behalf of the Administration. Their office had participated fully in now a two-year debate and discussion of the varying legal and policy issues presented by the late claim situation. They concurred in

the conclusion reached by the Administration that it probably is now time to put this issue to rest and move on to the adjudicating Montana's water rights. The specific interest in the Attorney General's office is to preserve and protect the integrity of the adjudication process, he said, along with challenges from the federal government.

{Tape: 2; Side: B; Approx. Counter: 00}

Chris Tweeten, appeared in his capacity as Chairman of the Reserve Water Rights Compact Commission. He stated their concerns as a commission that SB 387 has introduced, specifically with the impacts on their ability to negotiate water right compacts with the federal government. He asked the committee to recall their compact dealing with the water rights of the National Park Service at Bighorn Canyon and Little Bighorn Battlefield. It stated that the commission exists for the purpose of negotiating settlements of federal reserve water rights claims in Montana. He said they had reached compacts with the Fort Peck Tribes and the Northern Cheyenne Tribes and the two compacts settling the rights of the National Park Service for the five parks in Montana. They were currently in negotiation with a number of other Indian tribal governments with respect to tribal claims and dealing with a number of other federal agencies, he said. He explained the negotiation process and what their objectives were as a commission of that process. Their primary objective is the protection of existing Montana water rights. In many cases they were junior to federal reserve water rights of the Indian tribes and federal agencies and they therefore have the responsibility to attempt to negotiate by which they will subordinate their earlier water rights to existing rights that may have had later priority dates. They had found that the federal government and the Indian tribes were extremely reluctant to negotiate open-ended subordination agreements. They wanted to know the amount of waters they are being asked to subordinate. In adding a late claims process, as SB 287 provides, it would prevent the tribes and federal agencies from having an understanding of the magnitude of the rights to which they address. SB 310 had been addressed previously in the committee some years ago, he said, and amendments had been added making clear that a late claimant would not have standing to object to a water rights compact dated prior to the effective date of SB 310. In addition, it subordinated any late claims to water rights settled by negotiated compact or by adjudication which involved the federal water right. It provided the assurance they needed to give their negotiating partners. SB 387 as drafted strips that protection that was granted in SB 310. It does that by repealing the language that subordinates late claims to negotiated federal reserve water rights. He proposed amendments to SB 387 in the event that the late claims remission proceeds through the legislative process and becomes law. He said the amendments would assure that the passage of the bill does not impair the recently-negotiated compact with the National Park Service. Changing the rules after the signing of the compact

would impair the understanding of the federal government in respect to the compact and to future compacts. (EXHIBIT 13)

Questions From Committee Members and Responses:

SENATOR BAER questioned the sponsor about the \$666,000 cost projected by the fiscal note, and if he would agree to a mitigating filing fee for the late claims to make up the additional cost. Janice Rehberg responded to the question, saying that two years ago a filing fee was imposed. In addition, there is a provision that allows the court to recoup those costs, and they can charge the late claimants for court time and costs. SENATOR BAER asked if it was discretionary or required the court to recoup its costs? Ms. Rehberg stated that there was a "shall" in the language, changed in this bill to, "may", giving the court more flexibility. SENATOR GROSFIELD asked Ms. Rehberg if she would respond to the amendments by the Water Compact Commission and the chilling effect of their ability to deal with the subordination issue in the future. She stated that none of the adjudication was complete in those basins, so they are going on a guess as they proceed, both as to timely and late claims. The timely claims are not known at the time, as well as late claims, she stated, so uncertainty would be involved whether or not this bill was presented. Her understanding of the Cheyenne agreement was that the estimates were made, but they were just assumptions. The number of claims they were looking at was such a small amount that it seemed hard to believe it would put a chilling effect on negotiations. There was a much larger gap in knowledge when it comes to claims filed on time, she averred. She had philosophical problems with the amendments because the compacts were negotiated prior to the time Montanans had a chance to explore and examine and adjudicate their rights. She also expressed concern with the philosophy of protecting Montanan's water rights which was the objective of the adjudication. She thought there was room in the act to make adjustments. She thought it was overstated that there is nothing known about the volume of water with late claims. She maintained there was uncertainty anytime a contract was negotiated. She had no strong objections to the amendments, but said the timing of the compacts were a problem for both timely and late claimants. SENATOR GROSFIELD asked Holly Franz to explain "reasonable diligence", in her amendment. She said decrees had been issued on not so much on actual water use, but based on the intent of the appropriator. A person could intend to appropriate a full 160 acres, but at the time were only irrigating 60 acres. As long as "reasonable diligence" was used in going ahead with the appropriation, a person would get the benefit of the earlier priority date. Some of the decrees were used in filed notices of appropriations, she said, and some courts indicated they would allow irrigation but required reasonable diligence in developing it. As an example, a decree says 200 acres, yet it is very clear that only 50 acres were irrigated still 80 years later. SENATOR GROSFIELD asked what Montana Power's position would be in Sections 1-4. Ms. Franz replied that they would take no position. SENATOR

GROSFIELD questioned John Bloomquist about Sections 1-4. He asked if he attended water policy committee deliberations on this whole late claims study? Mr. Bloomquist said that he had attended most of the policy discussions and that they had remained neutral throughout. SENATOR GROSFIELD lamented the fact that most of the study commission members were gone, leaving REPRESENTATIVE HARPER and SENATOR MESAROS. His understanding of the study last session was that a comprehensive look at the issue had been taken and the committee had been unable to come up with any recommendations as to further remission without jeopardizing the adjudication process. Mr. Bloomquist said the synopsis was correct. The recommendation was that nothing more be done, and SB 310 was as far as they were comfortable in going. He said that this bill takes the equitable power approach of the courts and tried to utilize that in a manner to allow the claims to come in prior to a final decree. The only other parallel would be an on-going type of adjudication system such as used in Colorado. SENATOR HALLIGAN addressed Director Simonich. He asked how much money the water court costs on an annual basis now? Mr. Simonich said a guess would be about one million dollars over the course of the biennium. He said it was funded by RIT funds. SENATOR HALLIGAN said they had passed a repealer of the RIT funds out of the Senate, and asked if that money would not be available for the funding for the court. Mr. Simonich said SB 152 eliminates the RIT tax. The Constitution requires that the Resource Indemnity Trust remain inviolate at 100 million dollars. He said it is the interest income from the trust that has been used to fund various state agencies. The interest would continue to be available, he said. Over the past few years, diversions have been made before the money actually got into the trust, and that has funded agencies as well. SENATOR HALLIGAN suggested that if there was no funding for the court, the issue would go unresolved forever. Mr. Simonich said potentially it was possible, however, the legislature would have to look at each program funded by the RIT and establish priorities. SENATOR HALLIGAN questioned Ms. Rehberg about finding an end date to file the claims and the problem of funding. He asked if it was her intent to let water claims go on for 30 to 50 years of adjudication? Ms. Rehberg said they had tried to pattern the filing after the regular default provisions in both federal and state rules of procedure. Possibly it would leave an ability for people to come in to raise arguments, just as any defendant can do. The longer the time period, the less likely the court would find good cause or to find the criteria for rule 60-B, which is excusable neglect. If after people haven't filed claims in 50 years, she said, it would be hard to find excusable neglect. She said those claims should be heard on a case-by-case basis rather than decided by the legislature not even knowing what the situations were. On the funding issue, she stated that the \$633,000 was based on a prediction that 32 per cent of the late claims would receive objections. She thought it should be closer to 50 per cent and the numbers cut in half for the actual cost. The court would be allowed to assess fees, so the legislature would not have to fund the courts, she said. SENATOR CRIPPEN asked if the assessments

by the water court were now equalling or exceeding the cost of the filings? Ms. Rehberg did not know if any assessments were being made at this time. There was a \$150 fee put on late claims two years ago, she said, in addition to the \$40 fee people paid when they filed and were not told their claims were late. Under the rules the Supreme Court adopted in 1987, they mandated that the DCRC accept all the claims and process them regardless of the filing date. Even under the Supreme Court rules, the claims have been processed and are within the system. SENATOR CRIPPEN suggested a Subcommittee. Ms. Rehberg said the issue would be better resolved in the legislature because the claimants would not be faced with a challenge of adjudication in federal court. SENATOR DOHERTY asked the proponents why the time extension would be a good idea if they were looking at finality. Ms. Rehberg said the reason is that many of the mistakes that are discovered after the filing of the temporary decree. If they would set the 1996 deadline, in ten years they would revisit the decision, she felt. It would let it run its course to get the mistakes taken care of. In trying to draft a legally sound program, she followed traditional court concepts and tried to: 1) avoid coming back in ten years, and 2) provide a system that meshes well with the judiciary and the concepts they are familiar with. SENATOR DOHERTY asked Mr. Bloomquist if the bill would meet with the Stockgrowers wishes, without, "tipping the boat over?" Mr. Bloomquist said, in his opinion as a water attorney, that the U.S. would be hard-pressed to challenge the sufficiency of the adjudication under this bill. Mr. Tweeten was asked the same question. He replied the Compact Commission had no particular view to that question. He offered a personal opinion as an attorney. He stated that nobody knows and nobody can know. There is no case law. They were dealing with a legal standard that derived from a footnote in the U.S. Supreme Court opinion handed down about 15 years ago. There has been no further litigation in respect to the meaning of the footnote. He said there was some risk of Montana's water rights to be adjudicated in two courts at the same time, including the federal courts, requiring the claimants to pay extremely high prices. SENATOR NELSON asked about the \$150 filing fee that was above the \$40. Was it something the legislature imposed or something the court imposed? Ms. Rehberg answered it was imposed by the legislature two years ago. In response to when it would be imposed, she said the procedure to collect them has been in limbo, and the why and the how is uncertain. Mark Simonich said the fee was for any new claims filed in the three-year window. The fee is collected by the Department when the claim is filed.

Closing by Sponsor:

SENATOR BECK said it was a controversial issue the last time they were here. He feels that the people whose water rights that were adjudicated and decreed in the courts already and that did not get their timely filing in, are now running water on their farms and using that water. But as soon as the preliminary temporary decree is implemented, they will lose that water right. That's

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the people he was really worried about. He was not concerned about the people who filed on nebulous water rights, rather the ones that had their adjudicated rights in the process previous to this adjudication. It was a fairness issue. The longer it goes on, the more complicated it becomes. The fiscal note says it will extend for another year and one-quarter, the process of the water courts to put this into the system. There are things in the bill to shorten up the time frame. Maybe they would actually save money, he said, if the committee could come up with a way to expedite the process. He personally did not know how to straighten out the issue. He said portions of the law had neighbor fighting against neighbor. This is one system of state government that was not working all that well, he said.

CHAIRMAN CRIPPEN appointed a Subcommittee comprised of SENATOR HOLDEN, CHAIR; SENATOR REINY JABS, SENATOR HALLIGAN AND SENATOR GROSFIELD. He asked a recommendation back in no later than one week.

EXECUTIVE ACTION ON HB 250

Motion/Vote: SENATOR HALLIGAN MOVED THAT HB 250 BE CONCURRED IN. The MOTION CARRIED UNANIMOUSLY on an oral vote.

EXECUTIVE ACTION ON HB 161

Motion/Vote: SENATOR HALLIGAN MOVED THAT HB 161 BE CONCURRED IN. The MOTION CARRIED UNANIMOUSLY on an oral vote.

DATE _____

3-2-95

SEN:1995
wp.rollcall.man

Patty Walker
Atlasta Ranch
Box 320081
Glen, Montana 59732

Feb. 16, 1995

10
3-2-95
HB 387

To whom it may concern,

I come here today because I have a late claim and I want you to know what has happened to my family because of it. My husband and I bought our place in 1987, it is an old homestead and mostly rock and sagebrush. We did not get up one morning and decide that today we were going to file a water claim late. No the homesteader in 1910 got up one morning and went out with his shovel and dug out the spring and started to use the water on what is our place today. Our predecessor for whatever reason missed filing on this spring, and we have filed a late claim. This water has been in continuous use since 1910. Because of our late claim the Bureau of Land Management has decided that it wants our water, not because it needs water but because it felt that we no longer had any right to it. We have been taken in front of a water hearing and had to defend our historic water rights. The BLM lost but the hearing examiner left the door wide open for them to try again to take our water away. This was before Sen. bill 310 was passed. Then in 1992 we were cleaning out our spring when an armed BLM ranger came and tried to stop us from maintaining our spring. I have to say that every time we have tried to do any work on our spring the BLM has interfered with threats and intimidation. The last threat was our invitation to federal court in 1992. Judge Hatfield ruled last month that we as the defendants were guilty and had to prove ourselves innocent. That we after three owners and forty years, that we as the defendants had the burden of proof. And with that after he had the case for two years instead of giving the BLM what they asked for he gave the BLM our entire ranch. The BLM will stop at nothing to take our water away from us because of this late claim and because we will not sign our water rights over to them. We are awaiting our third invitation to defend ourselves and our water in court. Our BLM file says that the BLM intends to protest every single water right that originates on public land. That will be our forth invitation to court brought by the BLM.

All of this has happened in the eight years that we have had this place. All we want is to be left alone and live in peace and enjoy this place as our predecessors did. This has destroyed my life, my husbands life and my two sons lives. My husband has had to be put on medication because of the depression all of this has caused and I can't begin to tell you what it does to me when my 11 year old son for christmas the first thing on his list is for the government to leave us alone. Maybe there is nothing you can do to stop what is happening to us but PLEASE, please do something so that no other family has to go through what mine has.

59

Several years ago the legislature passed a law saying that for something as minor as a filing mistake historic rights would vaporize without even a chance to explain. I am asking you to make it right.

Sincerely,

Patty Walker
Patty Walker

SENATE JUDICIARY COMMITTEE

EXHIBIT NO. 11

Amendment to Senate Bill 387
First Reading Copy

DATE 3-2-95

FILE NO. 48 387

Prepared by Holly Franz
February 17, 1995

1. Page 7.

Following: line 23

Insert: "(8) The provisions of subsection (7) do not apply to issues arising after entry of the previous decree, including but not limited to abandonment, expansion of the water right, and reasonable diligence.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

LEGISLATIVE
COMMITTEE NO. 12

DATE 3-2-95

LEE METCALF BUILDING
1920 EAST SIXTH AVENUE

HB 387

MARC RACICOT, GOVERNOR

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-6699
TELEFAX NUMBER (406) 444-6721

PO BOX 202301
HELENA, MONTANA 59620-2301

STATEMENT OF DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
ON SENATE BILL 387
BEFORE THE SENATE JUDICIARY COMMITTEE
MARCH 2, 1995

Mr. Chairman and members of the Committee, my name is Mark Simonich. I am the Director of the Department of Natural Resources and Conservation. I am here today on behalf of the Department and the Administration to oppose Senate Bill 387.

The position of the administration and the decision to oppose this bill did not come easily. This is a very tough issue, and one which received very careful, thoughtful review. During recent years we have heard the accounts of many of those individuals with late claims. We have been told of the many and various reasons why some claims were not filed by the required deadline. In some of those cases it was not the fault of the claimant. Many of these accounts tug at one's heart strings. Certainly water is one of our most precious natural resources. The thought of losing the ability or the right to the use of that resource is more than many of us could contemplate. These stories of the late claimants are what made this decision so difficult.

However, be that as it may, it is still the determination of the administration that the late claims issue should be laid to rest. Two years ago this same committee heard a similar bill and agreed to offer partial remission of the forfeiture to the late claimants. That bill, as amended, also called upon the Water Policy Committee to conduct an interim study for the purpose of identifying and making recommendations for any possible further remission. The Water Policy Committee conducted that study with the cooperation and participation of the DNRC, the Attorney General's Office and a variety of water users. At the conclusion of the study the Water Policy Committee chose not to recommend any further remission of forfeiture.

It is our belief that it is now time to get on with the business of finishing the adjudication process in Montana. The adjudication is very complicated, very time consuming and very costly to all parties involved. This bill will only add to that. The legislature has addressed the late claims issue and has previously offered a partial remission. The legislature also opened the process for three years to allow additional claims to

be filed. That window will close July 1, 1996. ~~181~~ 182

Lets make sure we have this in perspective. Through June 30, 1993 3,197 late claims had been received by the Department. So far during this three year window for additional filing the department has received 301 new claims. This total of 3,498 late claims is in contrast to the approximately 200,000 water right claims that were filed within the original allotted time period.

The underlying public policy reason for filing deadlines is to bring finality to the settlement of issues and rights. It is not possible to have a fair, reliable, predictable and stable system of protection for the rights of competitive interests, if finality to the settlement of those rights is not available. Without finality the value of the rights that is intended to bring about predictability and respect is compromised. That does not mean that filing deadlines do not work inequities in individual cases. The law and the people who enact these laws regret such inequities, but the transcendent benefits of such public policies must be observed.

This is really a question of fairness and of balance. The question should be--How can we provide some relief to those late claimants without causing an undue burden or cost on all the others that filed the +200,000 claims on time? We believe that balance in fairness has been reached and no further action should be taken.

###

SB 387

PROPOSED AMENDMENTS

RESERVED WATER RIGHTS COMPACT COMMISSION

February 17, 1995

Page 2, line 22-23:

Strike: "prior to July 1, 1993"

Page 3, line 10-11:

Strike: "that is ratified by the legislature prior to July 1, 1993"

Insert: "after the date specified in a compact"

Page 3, line 14:

Add after "law": "; or be decreed as senior to a water right recognized in the compact"

Text with proposed amendments:

Page 2, lines 21-24:

"Accordingly, with respect only to a basin that has not been closed to further appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter, a claim of an existing water right not filed with the department on or before April 30, 1982, may be filed with the department on forms provided by the department."

Page 3, lines 9-14:

"(c) a person filing a late claim does not have the right or standing to object to any water rights compact reached in accordance with part 7 of this chapter **after the date specified in a compact**, except to the extent that right or standing to object exists based on a claim of water right filed on or before April 30, 1982, or to claim protection for the right represented in the late claim under any provision of a compact that subordinates the use of a water right recognized in the compact to a right recognized under state law; or be decreed as senior to a water right recognized in the compact"

SB 387

TESTIMONY OF -- ON BEHALF OF

THE RESERVED WATER RIGHTS COMPACT COMMISSION

February 17, 1995

The following testimony addresses only the impact of SB 387 on compacts between the State and federal and Tribal governments settling water rights. It does not address the broader implications of the impact of SB 387 on the adjudication or the exposure of the State to takings claims.

SB 387 adversely impacts compacts in two ways:

- (1) language in SB 387 is in direct conflict with SB 203, the compact between the State and the National Park Service settling water rights for the Little Bighorn Battlefield National Monument and Bighorn Canyon National Recreation Area which was passed by the Senate on a 50-0 vote and now awaits executive action in the House Natural Resources Committee; and
- (2) open ended late claim filing will jeopardize negotiation of future compacts by creating uncertainty in the status of water allocation in the affected basin.

#1 Conflict with SB 203:

SB 387 states on page 2, lines 21-24:

Accordingly, with respect only to a basin that has not been closed to further appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter prior to July 1, 1993, a claim of an existing water right not filed with the department on or before April 30, 1982, may be filed with the department on forms provided by the department.

SB 203 requires closure of drainages flowing into Bighorn Canyon National Recreation Area. Agreement concerning level of development allowed prior to closure was based on evaluation of existing claims. The 1993 date in SB 387 is in direct conflict with SB 203.

Remedy: remove "prior to July 1, 1993" from line 22-23

SB 387 states on page 3, lines 9-11:

a person filing a late claim does not have the right or standing to object to any water rights compact reached in accordance with part 7 of this chapter that is ratified by the legislature prior to July 1, 1993 . . .

SB 203 (Article II, Section C.2), page 10, lines 9-15 states:

The reserved water rights described in the Compact shall not be subordinate to water rights which were forfeited by 85-2-212 as interpreted in In the Matter of the Adjudication of the Water Rights within the Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992), nor shall any claimant of such forfeited water right have standing, based solely on such claimed right, to object to this Compact or any reserved water right described in this Compact . . .

This language is in direct conflict. It is likely that in statutory interpretation the more specific law, SB 203, would control. However, by not amending the language in SB 387, that decision is left to the discretion of a court. By amending SB 387 the legislature retains control of interpretation of its intent and prevents the risk of forcing re-negotiation of SB 203.

Remedy: replace "that is ratified by the legislature prior to July 1, 1993" on page 3 line 10-11, with: "after the date specified in a Compact"

#2 Future Compacts:

Negotiation of compacts focuses on allocation of water between federal and Indian rights and State-based rights. The DNRC database on filed and decreed rights and permits forms the basis for identification of State uses that require protection. SB 387 allows late claims to be filed at any time. State negotiators will lack certainty in the level of water use which must be protected, and federal and Tribal negotiators will be unlikely to agree to subordinate to existing use when that level of use is uncertain. For this reason, it is insufficient to replace the July 1, 1993 date discussed above with July 1, 1995. The more general remedies set forth above are necessary. In addition, the following amendment will assure negotiators that new claims will not be granted seniority after a compact is ratified:

Remedy: Page 3, line 14:

Add after "law": "; or be decreed as senior to a water right recognized in the compact"

DATE MARCH 2, 1995

SENATE COMMITTEE ON JUDICIARY

BILLS BEING HEARD TODAY: HB 161, HB 158, HB 250

SB 387

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Dallas D. Erickson	MCCL	161	X	
Patty Walker	Self	387	X	
Jan Renbis	ref. or Tegen Land & divestore	387	X	
Russell B Hill	MT Trial Lawyers	HB 158		✓
John Connor	MT County Attys Assn	HB 161	✓	
David Hemion	MT ASSO. of Churches	HB 161	✓	
SHARON HOFF	MT CATH. CONF	HB 161	✓	
Helen Christensen	MT State AFL-CIO	HB 158	✓ w/Am	
Mons TELGEN	Tegen L & Ls Co	387	X	
Michael O'Hara	Missoula Sheriff	HB 250	X	
Craig Reap	MHP	HB 250	X	
Dennis McPhee	Yellowstone County Sheriff	HB 250	X	
Chris O'Reilly	L & C Co Sheriff	HB 250	X	
Kathy McGowan	MSPOA	HB 250	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY 68

DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

< ■ >

PLEASE PRINT

< ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Joe Hansen	Edsall Cons	158	X	
Carl Schweitzer	Mont Cont Assoc	HB 158	X	
David Shanahan / JNTL	~~Ag. Pres. Assoc.~~ ~~Ind. Group~~	HB 158	✓	
Larry Brown	Ag. Pres. Assoc.	SB 387	✓	
Bob Torres	NASW	HB 161	✓	
MARK Simonich	DNRC	SB 387		✓

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE MARCH 2, 1995

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: HB 158 HB 250

< ■ >

PLEASE PRINT

< ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Roger McLENN	INDEPENDENT MS AGENTS ASSOC OF MT	158	X	
MARK AGATHER	SELF	158	X	
RON MCCULLUGH	SETTLENCORP CO.	158	X	
LORIAN DRAUBY	COGSWELL Agency	158	✓	
JAMES CASHELL	MSPORA	250	X	
Laure Kottuk	Christian Coalition of MT	161	✓	
C Jeff Cox	~~MTFB~~ SELF	387	✓	
Lorna Frank	Mt. Farm Bureau	387	✓	
Ron Ashabranner	State Farm Ins	158	✓	
Mary Alice Cook	Adm. for MT's Children	161 ~~HB 250~~	✓	
Arlette Kandash	Eagle Forum	161	✓	
Holly Franz	Mt. Power Co.	SB387	unanimous ✓ 5+6	
Chris Tweeton	Providence Rb Comm'n Conquest	SB387		unanimous ✓
Jaqueline Denmark	Am. Ins. Assoc.	HB 158	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

MINUTES

**MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN BRUCE D. CRIPPEN, on March 6, 1995,
at 9:00 a.m.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Keintz, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 41, HB 176, HB 231, HB 547
Executive Action: HB 176, HB 231, HB 234, HB 41, SB 387

HEARING ON HB 176

Opening Statement by Sponsor:

REPRESENTATIVE TONI HAGENER, House District 90, Havre, presented HB 176. This bill is brought at the request of the Judicial Unification and Finance Commission which was created in the 1993 Legislative Session in response to concerns raised by the State Bar of Montana and the Montana Association of Counties that Montana's courts were running out of money. Thirty six of Montana's counties were experiencing district court funding problems. To address these issues, the district court funding committee recommended that the legislature initiate a thorough examination of court unification and finance. HB 525 passed in

REPRESENTATIVE SMITH stated that Section 1 has to do with the powers and duties of the mental disabilities board of visitors. Lines 28 and 29, page 3 states that the board of visitors must be fully informed of the matter within five working days after the beginning of the involuntary administration. If the board of visitors was not in place, that sentence would become obsolete. Page 5, lines 17 and 18, uses the same language. She recommended a contingency amendment that set forth a continued review of the prescribing of medications. This bill has a large amount of consumer protection and still gives the courts the ability to assign the involuntary commitment. The oversight needs to be continued through a committee which has a consumer advocate and a report to be given back to the governor.

Closing by Sponsor:

REPRESENTATIVE SMITH stated this bill includes substantial protection to ensure that involuntary medication is not used improperly. These protections include: (1) court order required, (2) a medical director must approve the order not necessarily the psychiatrist who is treating, (3) a review committee including non-hospital staff and (4) and oversight by that committee or board of visitors who must report to the governor on an annual basis.

Addition exhibit, letter from Andree Larose, Staff Attorney, Montana Advocacy Program, EXHIBIT 9.

{Tape: 2; Side: A}

EXECUTIVE ACTION ON HB 231

Motion/Vote: SENATOR BISHOP MOVED HB 231 BE CONCURRED IN. The motion CARRIED UNANIMOUSLY on oral vote.

EXECUTIVE ACTION ON SB 387

Discussion: SENATOR HOLDEN stated the bill was accepted by the subcommittee with some changes. The main issue ~~was whether they~~ would change the termination date on late filing claims which the legislature established in 1993. That date would have been July 1, 1996. SB 387, pages 1, 2, 3, and 4, dealt with that issue. They felt it was imperative that the system would not be changed. Those pages were deleted. Mrs. Rehberg and the Department accepted the changes. The rationale was that many users of water in the state of Montana correctly filed their water rights. They would be jeopardizing their rights if this was reopened to another system of filing water rights.

SENATOR HALLIGAN stated that they left the existing date of 96 to wait until the adjudication process was completed. He stated the next part of the bill set up an advisory committee. They changed the person appointing the committee from the chief water judge to

the governor. They added a district court judge to the committee.

Motion: SENATOR HALLIGAN MOVED TO AMEND SB 387.

Discussion: SENATOR BAER asked how the amendments affect the fiscal note.

SENATOR HOLDEN commented that the fiscal note is irrelevant. The costs have been taken out of the bill.

SENATOR HALLIGAN stated that if in 1910 a judge had adjudicated the water rights of some of the parties in a stream and the issues in that decree and the parties were the same and later this is to be relitigated, the court would deny the relitigation. They tried to give some protection for those people whose rights had actually gone to court. A late filed claim is subordinate to the other claims. If they are continuously using their water, that will continue anyway if their neighbors haven't objected.

SENATOR GROSFIELD stated there were cases where the lack of a party to comply with the adjudication law created some problems. The other side to that is that over 206,000 claims were filed timely and they have to be careful not to jeopardize the people who complied with the law.

SENATOR HOLDEN continued explaining the amendments. On page 7, line 15, the word "shall" was changed to "may". On line 18, (a) (b) (c) and (d) were combined into a general statement.

SENATOR GROSFIELD stated "shall" was changed to "may" to give the court discretion in cases where there may be extenuating circumstances.

SENATOR BECK stated the purpose of the bill was to stop the litigation of cases which had already been to the Supreme Court on some of the adjudicated streams. The bill read that the court "shall" take a look at those situations so the same water right is not relitigated in the same case.

CHAIRMAN CRIPPEN stated if the water right had been adjudicated and was later taken as a successor-in-interest, the Bureau of Reclamation would not have a claim.

SENATOR HALLIGAN commented that is why they used the word "may".

CHAIRMAN CRIPPEN questioned whether he could openly and notoriously for an appropriate period of time with posting effect a claim preclusion.

SENATOR HALLIGAN stated the only way to deal with res judicata and collateral estoppel would be the issue and claim preclusion so that the identical issues, identical parties, similar claims, would preclude people. They did not want to complicate the

matter with new law when they could rely on the existing Supreme Court decisions in those areas.

SENATOR GROSFIELD requested a change in the amendments concerning the makeup of the advisory committee. They had the governor appoint the subcommittee which would consist of three attorneys who practice before the water court. He would like to insert three "non-governmental" attorneys. He would not like to see 2 or 3 attorneys from DNRC. DNRC is already on the committee ex officio in (3).

SENATOR BECK commented he did not want bureaucracy on this committee. He wants an unbiased committee.

Chris Tweeten, Attorney General's Office, commented that he visited with Judge Loble at the subcommittee meeting regarding having representation from the federal government. The federal government is the largest single claimant of water rights. Judge Loble believed having a federal representative on the committee would be helpful to him. He asked if the governor might invite a representative from the federal government to fill one of the attorney positions.

CHAIRMAN CRIPPEN commented "non-governmental" would exclude that.

SENATOR GROSFIELD suggested adding that an attorney representing the federal government might serve in an ex officio capacity.

Mr. Tweeten suggested in (3) insert a comma after conservation, and then add "a representative of the United States". The governor could communicate with the Department of Justice or the Department of Interior and make his selection in consultation with them as to who would be the most appropriate representative.

SENATOR NELSON asked if someone had water rights dating back to the early 1900s and went to a lawyer to have them filed prior to 1982 and the lawyer did not handle this correctly, is that person better or worse off with this bill as amended?

SENATOR HALLIGAN stated the deadline was extended a little further; however, they could have sued the lawyer if the statute of limitations had not run. This bill does not change that scenario.

Vote: The motion to amend CARRIED UNANIMOUSLY on oral vote.

Motion: SENATOR HOLDEN MOVED SB 387 DO PASS AS AMENDED.

Discussion: SENATOR DOHERTY stated the subcommittee did a very good job going over this bill. If history serves as advice, when this bill comes back from the House there will be a conference committee and an enormous amount of gnashing of teeth. He asked the chair to ask the House that this bill not be handled in that manner.

Vote: The motion CARRIED UNANIMOUSLY on oral vote.

EXECUTIVE ACTION ON HB 176

Motion: SENATOR GROSFIELD MOVED TO AMEND HB 176 BY STRIKING THE STATUTORY APPROPRIATION.

Discussion: SENATOR GROSFIELD commented that very few statutory appropriations are put in as sunsetted. He believed that statutory appropriations do not get reviewed very well. With the sunset clause, there is an intent on the part of the sponsor that the program will be reviewed carefully. SENATOR BECK is the vice chairman of the subcommittee which has dealt with this. Apparently all the money has been taken from this program because it was funded from the general fund. If the statutory appropriation is eliminated, but the earmarking is left in the bill, he felt that the subcommittee would reinstate the funding.

Vote: The motion CARRIED UNANIMOUSLY on oral vote.

Discussion: SENATOR HOLDEN, referring to page 1, line 26, stated that Mr. Koch had concerns about whether or not the surcharge would be called an allowable cost.

Motion: SENATOR HOLDEN MOVED TO FURTHER AMEND HB 176, ON PAGE 1, LINE 26, AFTER THE WORD "COURT" HE WOULD INSERT "THE SURCHARGE IS AN ALLOWABLE COST."

Discussion: SENATOR HALLIGAN commented if it is a user fee it should be paid by the individual using the system. They have never differentiated in the civil or criminal process before. He opposed the amendment in the sense of fairness. We are identifying a particular industry for favorable treatment.

CHAIRMAN CRIPPEN clarified if this amendment is adopted the fee will fall under the definition of allowable cost in §25-10-201, MCA, which states, "A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows:" The prevailing party is entitled to collect the fee from the losing cost.

SENATOR BARTLETT stated that this fee was modeled after the surcharge for county attorney salaries. She asked if that surcharge is a allowable cost.

SENATOR HALLIGAN stated that dealt with criminal costs and is paid up front. Allowable costs go more to civil cases. The surcharge for the county attorney salaries is paid by the client and is not passed on to anyone else.

DATE _____

3-6-1995

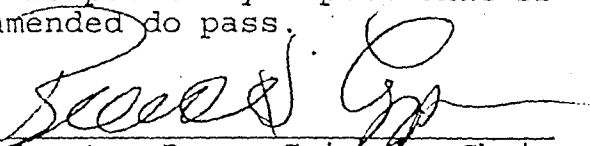
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SENATE STANDING COMMITTEE REPORT

Page 1 of 3
March 6, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration SB 387 (first reading copy -- white), respectfully report that SB 387 be amended as follows and as so amended do pass.

Signed: 
Senator Bruce Crippen, Chair

That such amendments read:

1. Title, lines 4 through 6.

Following: "AN ACT" on line 4

Strike: remainder of line 4 through "DISMISSED" on line 6

Insert: "CLARIFYING APPLICATION OF COMMON-LAW RULES OF ISSUE AND
CLAIM PRECLUSION TO THE ADJUDICATION OF EXISTING WATER
RIGHTS"

2. Title, line 7.

Following: "CLAIMS;"

Strike: "ESTABLISHING"

Insert: "AUTHORIZING THE GOVERNOR TO APPOINT"

3. Title, lines 8 and 9.

Following: "SECTIONS" on line 8

Strike: remainder of line 8 through "85-2-226," on line 9

4. Title, line 9.

Following: "85-2-233"

Strike: ", "

5. Page 1, lines 11 through 19.

Strike: statement of intent in its entirety

6. Page 1, line 23 through page 5, line 24.

Strike: sections 1 through 5 in their entirety

Insert: "NEW SECTION. Section 1. Water adjudication advisory committee -- appointment. (1) The governor shall appoint a water adjudication advisory committee to provide recommendations to the water court, the Montana supreme court, the department of natural resources and conservation, and the legislature on methods to improve and expedite the water adjudication process.

(2) The committee consists of three nongovernmental attorneys who practice before the water court, one district court judge, and three water users who have filed statements of claim with the department of natural resources and conservation under Title 3, chapter 7.

 Amd. Coord.

 Sec. of Senate

521442SC.SPV

(3) The chief water judge or the judge's designee shall serve as an ex officio member of the committee. The governor may appoint the attorney general or the attorney general's designee, a representative from the department of natural resources and conservation, and a representative of the United States government as ex officio members of the committee.

(4) The committee members shall serve at the pleasure of the governor and shall serve without compensation.

(5) The committee shall file a report with the governor by October 1, 1996, and as often thereafter as determined by the governor."

Renumber: subsequent sections

7. Page 6, lines 23 through 26.

Following: "must" on line 23

Strike: remainder of line 23 through "must" on line 26

8. Page 7, line 15.

Strike: "shall"

Insert: "may"

9. Page 7, line 17.

Strike: ":",

Insert: "if dismissal is consistent with common-law principles of issue and claim preclusion."

10. Page 7, lines 18 through 23.

Strike: subsections (a) through (e) in their entirety

Insert: "(8) The provisions of subsection (7) do not apply to issues arising after entry of the previous decree, including but not limited to the issues of abandonment, expansion of the water right, and reasonable diligence."

11. Page 8, line 2.

Following: "upon"

Strike: "a motion raising"

12. Page 8, line 3.

Following: "in the"

Strike: "proceedings on the motion"

Insert: "matter in which the ruling was issued"

13. Page 8, line 4.

Insert: "NEW SECTION. Section 4. Codification instruction.

[Section 1] is intended to be codified as an integral part of Title 2, chapter 15, part 2, and the provisions of Title 2, chapter 15, part 2, apply to [section 1]."

Renumber: subsequent section

-END-

SENATE BILL NO. 387

INTRODUCED BY BECK

A BILL FOR AN ACT ENTITLED: "AN ACT ~~PROVIDING ADDITIONAL FORFEITURE REMISSION FOR PERSONS FILING LATE WATER CLAIMS; IDENTIFYING CERTAIN SITUATIONS IN WHICH OBJECTIONS TO A WATER CLAIM MUST BE DISMISSED~~ CLARIFYING APPLICATION OF COMMON-LAW RULES OF ISSUE AND CLAIM PRECLUSION TO THE ADJUDICATION OF EXISTING WATER RIGHTS; EXPANDING THE WATER CLAIM APPEAL PROCESS; CLARIFYING STANDING FOR OBJECTIONS TO WATER CLAIMS; ~~ESTABLISHING~~ AUTHORIZING THE GOVERNOR TO APPOINT A WATER ADJUDICATION ADVISORY COMMITTEE; AMENDING SECTIONS ~~3-7-103, 85-2-214, 85-2-221, 85-2-225, 85-2-226, 85-2-233, AND 85-2-235, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.~~"

STATEMENT OF INTENT

A statement of intent is necessary for this bill because ~~[section 1] encourages the Montana supreme court and the water court to adopt procedural rules. The legislature intends that the courts adopt abandonment relief rules that recognize the courts' existing equitable powers. These rules should consider and adopt equitable principles and existing rules of procedure, including but not limited to the equitable principles of detrimental reliance, good cause, equitable tolling, and excusable neglect and Rules 55 and 60, Montana and Federal Rules of Civil Procedure. The courts may by rule identify certain situations in which relief from abandonment will be granted after 1996 and under what terms relief will be granted in order to secure the interests of justice and may establish procedures for implementing [this act].~~

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

~~Section 1. Section 85-2-214, MCA, is amended to read:~~

~~"85-2-214. Commencement of action. (1) The action for the adjudication of all existing water rights under this part, part 7, and Title 3, chapter 7, is commenced with the issuing of the order by the Montana supreme court to file a statement of a claim of an existing water right as provided in 85-2-212. As to each claim, the action is considered filed in the judicial district of the county in which the diversion is made or, if there is a claimed right with no diversion, in the judicial district of the county in which the~~

1 ~~use occurs.~~

2 ~~(2) The water judge shall monitor the claim filing procedure for claims within his the water division~~
3 ~~and make any orders necessary to assure timely and accurate compliance with the claim filing procedure.~~

4 ~~(3) The water judge may relieve a party from abandonment of a claim under 85-2-226, as follows:~~

5 ~~(a) For claims filed after July 1, 1996, but before the issuance of a preliminary decree, relief may~~
6 ~~be granted for good cause shown and upon those terms as are just and in accordance with 85-2-224.~~

7 ~~(b) For claims filed after the entry of a preliminary decree, relief may be granted under the~~
8 ~~provisions of Rule 60, Montana Rules of Civil Procedure.~~

9 ~~(4) The Montana supreme court and the water court are encouraged to adopt procedural rules~~
10 ~~required to implement the provisions of subsection (3)."~~

11
12 **Section 2.** Section 85-2-221, MCA, is amended to read:

13 ~~"85-2-221. Filing of claim of existing water right — filing late claim. (1) A person claiming an~~
14 ~~existing right, unless exempted under 85-2-222 or unless an earlier filing date is ordered as provided in~~
15 ~~85-2-212, shall file with the department no later than June 30, 1983, a statement of claim for each water~~
16 ~~right asserted on a form provided by the department.~~

17 ~~(2) The department shall file a copy of each statement of claim with the clerk of the district court~~
18 ~~for the judicial district in which the diversion is made or, if there is a claimed right with no diversion, the~~
19 ~~department shall file a copy of the statement of claim with the clerk of the district court of the judicial~~
20 ~~district in which the use occurs.~~

21 ~~(3) Subject to certain terms and conditions, the legislature intends to provide for the remission of~~
22 ~~the forfeiture of existing rights to the use of water caused by the failure to comply with subsection (1) as~~
23 ~~provided under 85-2-214. Accordingly, with respect only to a basin that has not been closed to further~~
24 ~~appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter prior to July 1,~~
25 ~~1993, a claim of an existing water right not filed with the department on or before April 30, 1982, may be~~
26 ~~filed with the department on or before July 1, 1996, on forms provided by the department. This section~~
27 ~~is not intended to prevent allow the filing of a late claim in addition to a claim of an existing water right filed~~
28 ~~on or before April 30, 1982, if and to the extent that the additional right claimed is not the same as the~~
29 ~~right that was the subject of a previous claim and is not an abandoned right. Claims must be physically~~
30 ~~submitted to the department or sent by United States mail, postmarked on or before the deadline set forth~~

1 in this subsection, in order to be considered timely. The Late claims are then subject to adjudication by the
2 district courts as any other claim of existing right. The claimant is then subject to all rights and obligations
3 of any other party, except that water court, subject to the provisions of this part, rules adopted by the
4 Montana supreme court or the water court, and the following:

5 (a) ~~a late claim must be incorporated into the adjudication, subject to all proceedings that have~~
6 ~~taken place prior to the date of filing;~~

7 (b) ~~the person filing a late claim may request that a decree previously entered be reopened or may~~
8 ~~object to matters previously determined on the merits by the water court only to the extent that the request~~
9 ~~or objection is otherwise authorized by law and is based on a claim of water right filed on or before April~~
10 ~~30, 1982;~~

11 (c) ~~a person filing a late claim does not have the right or standing to object to any water rights~~
12 ~~compact reached in accordance with part 7 of this chapter that is ratified by the legislature prior to July~~
13 ~~1, 1993, except to the extent that right or standing to object exists based on a claim of water right filed~~
14 ~~on or before April 30, 1982, or to claim protection for the right represented in the late claim under any~~
15 ~~provision of such a compact that subordinates the use of a water right recognized in the compact to a right~~
16 ~~recognized under state law;~~

17 (d) ~~if the water judge, following objection under 85-2-233, finds that the right represented in the~~
18 ~~late claim was the subject of a prior order or decree by the water judge or is otherwise without merit, the~~
19 ~~water judge shall award costs and reasonable attorney fees to the person or persons filing the an objection~~
20 ~~to a late claim;~~

21 (e) ~~a right represented in a late claim is may be subordinate to all federal and Indian reserved water~~
22 ~~rights established by compact or decree under this chapter other water rights upon terms that the court~~
23 ~~determines are just under the circumstances;~~

24 (f) ~~unless a late claim either was placed in the United States mail and postmarked on or before April~~
25 ~~30, 1982, or, if there is no evidence of the date of mailing, there is evidence of execution on or before April~~
26 ~~30, 1982, and actual receipt by the department on or before May 7, 1982, the right represented in the~~
27 ~~claim is, in addition, subordinate to:~~

28 (i) ~~rights represented in all valid, timely filed claims; and~~

29 (ii) ~~rights represented in a permit or reservation of water issued under this chapter if and to the~~
30 ~~extent that the person holding the permit or reservation files an objection under this part and proves that~~



1 the person holding the permit or reservation reasonably relied to the detriment of the person holding the
2 permit or reservation upon the failure of the claimant to file a claim on or before April 30, 1982.

3 (4) ~~The department and the district courts may not accept any statements of claim physically~~
4 ~~submitted or postmarked after July 1, 1996, and shall notify a person who files a claim after July 1, 1996,~~
5 ~~that the claim will not be accepted late claims filed after July 1, 1996, are subject to the provisions of~~
6 ~~85-2-214(3)(a).~~"

7
8 **Section 3.** ~~Section 85-2-225, MCA, is amended to read:~~

9 ~~"85-2-225. Filing fee — processing fee for remitted claims. (1) Each claim filed under 85-2-221~~
10 ~~or 85-2-222 must be accompanied by a filing fee in the amount of \$40, subject to the following exceptions:~~

11 (a) ~~the total filing fees for all claims filed by one person in any one water court division may not~~
12 ~~exceed \$480; and~~

13 (b) ~~no a filing fee is not required accompanying a claim of an existing right that is included in a~~
14 ~~decree of a court in the state of Montana and that is accompanied by a copy of that decree or pertinent~~
15 ~~portion thereof of the decree.~~

16 (2) ~~A claim that is exempt from the filing requirements of 85-2-221(1) but that is voluntarily filed~~
17 ~~must be accompanied by a filing fee in the amount of \$40. Exempt claims for a single development with~~
18 ~~several uses if filed simultaneously may be accompanied by a filing fee in the amount of \$40.~~

19 (3) (a) ~~Except as provided in subsection (3)(c), in addition to the filing fee set forth in subsection~~
20 ~~(1), each statement of claim filed under 85-2-221(3) must be accompanied by a processing fee in the~~
21 ~~amount of \$150, which must be deposited in the water rights adjudication account for the examination of~~
22 ~~late claims by the department and for the publication of notices by the department as required under~~
23 ~~85-2-213(2).~~

24 (b) ~~The water judge shall may assess against the late claimant all reasonable administrative costs~~
25 ~~and expenses that may be incurred by the court due to the filing of the late claim and the consideration of~~
26 ~~the objection, which in reaching a determination whether to relieve a party from abandonment as provided~~
27 ~~in 85-2-214. The court may award other fees and expenses against the party asserting a late claim as it~~
28 ~~determines just under the circumstances. Any assessment rendered by the court must be deposited in the~~
29 ~~water rights adjudication account.~~

30 (c) ~~For a statement of claim that was filed after April 30, 1982, but prior to July 1, 1993, or for~~

1 a statement of claim filed by a state agency, the processing fee provided for in subsection (3)(a) must be
2 paid on or before a date to be established by the department by rule, but no later than July 1, 1999."

3
4 ~~Section 4. Section 85-2-226, MCA, is amended to read:~~

5 ~~"85-2-226. Abandonment by failure to file claim. The Except as provided in 85-2-214, the failure~~
6 ~~to file a claim of an existing right as required by 85-2-221(1) establishes a conclusive presumption of~~
7 ~~abandonment of that right."~~

8
9 ~~Section 5. Section 3-7-103, MCA, is amended to read:~~

10 ~~"3-7-103. Promulgation of rules and prescription of forms advisory committee. (1) As soon as~~
11 ~~practicable the Montana supreme court may promulgate special rules of practice and procedure and shall~~
12 ~~prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in~~
13 ~~consultation with the water judge and the department of natural resources and conservation.~~

14 ~~(2) (a) The chief water judge shall appoint a water adjudication advisory committee to provide~~
15 ~~recommendations to the water court, the Montana supreme court, the department of natural resources and~~
16 ~~conservation, and the legislature on methods to improve and expedite the water adjudication process.~~

17 ~~(b) The committee consists of four attorneys who practice before the water court and three water~~
18 ~~users who have filed statements of claim with the department of natural resources and conservation under~~
19 ~~this chapter.~~

20 ~~(c) The chief water judge or the judge's designee shall serve as an ex officio member of the~~
21 ~~committee. The Montana supreme court may appoint the attorney general or the attorney general's~~
22 ~~designee and a representative from the department of natural resources and conservation as ex officio~~
23 ~~members of the committee.~~

24 ~~(d) The committee members shall serve at the pleasure of the water court and shall serve without~~
25 ~~compensation.~~

26 ~~(e) The committee shall file a report with the Montana supreme court by October 1, 1996, and as~~
27 ~~often as determined by the Montana supreme court."~~

28
29 **NEW SECTION. SECTION 1. WATER ADJUDICATION ADVISORY COMMITTEE -- APPOINTMENT.**

30 **(1) THE GOVERNOR SHALL APPOINT A WATER ADJUDICATION ADVISORY COMMITTEE TO PROVIDE**

1 RECOMMENDATIONS TO THE WATER COURT, THE MONTANA SUPREME COURT, THE DEPARTMENT
2 OF NATURAL RESOURCES AND CONSERVATION, AND THE LEGISLATURE ON METHODS TO IMPROVE
3 AND EXPEDITE THE WATER ADJUDICATION PROCESS.

4 (2) THE COMMITTEE CONSISTS OF THREE NONGOVERNMENTAL ATTORNEYS WHO PRACTICE
5 BEFORE THE WATER COURT, ONE DISTRICT COURT JUDGE, AND THREE WATER USERS WHO HAVE
6 FILED STATEMENTS OF CLAIM WITH THE DEPARTMENT OF NATURAL RESOURCES AND
7 CONSERVATION UNDER TITLE 3, CHAPTER 7.

8 (3) THE CHIEF WATER JUDGE OR THE JUDGE'S DESIGNEE SHALL SERVE AS AN EX OFFICIO
9 MEMBER OF THE COMMITTEE. THE GOVERNOR MAY APPOINT THE ATTORNEY GENERAL OR THE
10 ATTORNEY GENERAL'S DESIGNEE, A REPRESENTATIVE FROM THE DEPARTMENT OF NATURAL
11 RESOURCES AND CONSERVATION, AND A REPRESENTATIVE OF THE UNITED STATES GOVERNMENT
12 AS EX OFFICIO MEMBERS OF THE COMMITTEE.

13 (4) THE COMMITTEE MEMBERS SHALL SERVE AT THE PLEASURE OF THE GOVERNOR AND
14 SHALL SERVE WITHOUT COMPENSATION.

15 (5) THE COMMITTEE SHALL FILE A REPORT WITH THE GOVERNOR BY OCTOBER 1, 1996, AND
16 AS OFTEN THEREAFTER AS DETERMINED BY THE GOVERNOR.

17
18 **Section 2.** Section 85-2-233, MCA, is amended to read:

19 **"85-2-233. Hearing on temporary preliminary decree or preliminary decree.** (1) (a) For good cause
20 shown and subject to the provisions of subsection (7), a hearing shall must be held before the water judge
21 on any objection to a temporary preliminary decree or preliminary decree by:

22 (i) the department;

23 (ii) a person named in the temporary preliminary decree or preliminary decree;

24 (iii) any person within the basin entitled to receive notice under 85-2-232(1); or

25 (iv) any other person who claims rights to the use of water from sources in other basins that are
26 hydrologically connected to the sources within the decreed basin and who would be entitled to receive
27 notice under 85-2-232 if ~~he~~ the claim or claims were from sources within the decreed basin.

28 (b) For the purposes of this subsection (1), "good cause shown" means a written statement
29 showing that a person has an ownership interest in water or its use that has been affected by the decree.

30 (c) A person does not waive the right to object to a preliminary decree by failing to object to a

1 temporary preliminary decree. However, a person may not raise an objection to a matter in a preliminary
2 decree if ~~he~~ that person was a party to the matter when the matter was previously litigated and resolved
3 as the result of an objection raised in a temporary preliminary decree, unless the objection is allowed for
4 any of the following reasons:

5 (i) mistake, inadvertence, surprise, or excusable neglect;

6 (ii) newly discovered evidence that by due diligence could not have been discovered in time to move
7 for a new trial under Rule 59(b), Montana Rules of Civil Procedure;

8 (iii) fraud, misrepresentation, or other misconduct of an adverse party;

9 (iv) the judgment is void; or

10 (v) any other reason justifying relief from the operation of the judgment.

11 (2) If a hearing is requested, the request must be filed with the water judge within 180 days after
12 entry of the temporary preliminary decree or preliminary decree. The water judge may, for good cause
13 shown, extend this time limit up to two additional 90-day periods if application for an extension is made
14 prior to expiration of the original 180-day period or any extension of it.

15 (3) The request for a hearing ~~shall must contain a precise statement of the findings and conclusions~~
16 ~~in the temporary preliminary decree or preliminary decree with which the department or person requesting~~
17 ~~the hearing disagrees. The request shall must specify the paragraphs and pages containing the findings~~
18 ~~and conclusions to which objection is made. The request shall must state the specific grounds and~~
19 ~~evidence on which the objections are based.~~

20 (4) Upon expiration of the time for filing objections and upon timely receipt of a request for a
21 hearing, the water judge shall notify each party named in the temporary preliminary decree or preliminary
22 decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to
23 participate in future proceedings must appear or file a statement. The water judge shall then set a date for
24 a hearing. The water judge may conduct individual or consolidated hearings. A hearing ~~shall~~ must be
25 conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the
26 water master, who shall prepare a report of the hearing as provided in ~~M.R.Civ.P.,~~ Rule 53(e), Montana
27 Rules of Civil Procedure.

28 (5) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or
29 85-2-703 bars any subsequent cause of action in the water court.

30 (6) If the court sustains an objection to a compact, it may declare the compact void. The agency

of the United States, the tribe, or the United States on behalf of the tribe party to the compact ~~shall be~~ is permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall ~~thereafter~~ issue a new preliminary decree in accordance with 85-2-231¹, ~~provided,~~ ~~however~~ However, that any party to a compact declared void may appeal from ~~such~~ that determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal ~~shall stay~~ stays the period for filing a statement of claim as required under this subsection.

(7) Upon petition by a claimant, the water court shall MAY grant a motion for dismissal to an objection to a temporary preliminary or preliminary decree if the objection pertains to an element of a water right that was previously decreed and: IF DISMISSAL IS CONSISTENT WITH COMMON-LAW PRINCIPLES OF ISSUE AND CLAIM PRECLUSION.

~~(a) the objector or the objector's predecessor in interest was a party to the previous decree;~~

~~(b) the claimant's water right was challenged in the previous decree litigation;~~

~~(c) the claimant's water right was actually litigated;~~

~~(d) a determination was made by the court regarding the elements of the water right that are the subject of objection; and~~

~~(e) the right as claimed conforms to the previous decree.~~

(8) THE PROVISIONS OF SUBSECTION (7) DO NOT APPLY TO ISSUES ARISING AFTER ENTRY OF THE PREVIOUS DECREE, INCLUDING BUT NOT LIMITED TO THE ISSUES OF ABANDONMENT, EXPANSION OF THE WATER RIGHT, AND REASONABLE DILIGENCE."

Section 3. Section 85-2-235, MCA, is amended to read:

"85-2-235. Appeals from final decree. (1) A person whose existing rights and priorities are determined in ~~the~~ a final decree may appeal the determination only if:

~~(1)(a) he~~ (1)(a) the person requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree; or

~~(2)(b) his~~ (2)(b) the person's rights or priorities as determined in the temporary preliminary decree or the preliminary decree were affected as the result of an objection filed by another person.

(2) An interlocutory ruling by the water judge upon a motion raising a question of law may be appealed by any party affected by the decision and who participated in the proceedings on the motion MATTER IN WHICH THE RULING WAS ISSUED."

1 NEW SECTION. SECTION 4. CODIFICATION INSTRUCTION. [SECTION 1] IS INTENDED TO BE
2 CODIFIED AS AN INTEGRAL PART OF TITLE 2, CHAPTER 15, PART 2, AND THE PROVISIONS OF TITLE
3 2, CHAPTER 15, PART 2, APPLY TO [SECTION 1].

4
5 NEW SECTION. Section 5. Effective date. [This act] is effective on passage and approval.

6 -END-

80

HOUSE NATURAL RESOURCES

Page 6

- BILL NO - REFERRED - HEARING - OTHER CONSIDERATION DATES - EXECUTIVE ACTION/DATE/VOTE ----- REREFERRED ----- DATE READ

SB0347	CRISMORE, WILLIAM	BOARD OF LAND COMM'RS GRANT OF RECIPROCAL ACCESS RE STATE FOREST LANDS	2/22	3/20	CONCUR AS AMENDED 3/21	VOTE: 12-6	3/22
SB0349	FOSTER, MIKE	GENERALLY REVISE COMMERCIAL HAZARDOUS WASTE PERMIT REQUIREMENTS	2/22	3/15	CONCUR AS AMENDED 3/21	VOTE: 10-7	3/22
SB0362	TVEIT, LARRY	GROUND WATER PERMIT PROVISIONS -- EXEMPTIONS	2/27	3/10	CONCUR AS AMENDED 3/13	VOTE: 12-6	3/15
SB0366	COLE, MACK	GENERALLY REVISE MONTANA MAJOR FACILITY SITING ACT	3/24	3/31	CONCUR 4/5	VOTE: 12-6	4/06
SB0371	GROSFIELD, LORENTS	OUTSTANDING RESOURCE WATERS -- CRITERIA -- LIMITATIONS	2/22	3/20	CONCUR AS AMENDED 3/21	VOTE: 12-6	3/22
SB0373	FOSTER, MIKE	METAL MINE RECLAMATION -- BONDING CRITERIA	2/22	3/15	CONCUR 3/15	VOTE: 18-0	3/16
SB0382	HARP, JOHN	REVISE CECRA, ALLOCATE RIT INTEREST, CREATE A VOLUNTARY CLEANUP PROG	3/28	3/31	CONCUR AS AMENDED 4/5	VOTE: 14-4	4/06
SB0386	DEVLIN, GERRY	EXEMPT CERTAIN NONCOMMERCIAL FARM AND RESIDENTIAL UNDERGROUND STORAGE TANKS	2/22	3/15	CONCUR AS AMENDED 3/20	VOTE: 10-8	3/21
SB0387	BECK, TOM	CLARIFY WATER RIGHTS ADJUDICATION; EXPAND THE WATER CLAIM APPEAL PROCESS	3/13	3/22	CONCUR AS AMENDED 3/22	VOTE: 18-0	3/23
SB0406	NELSON, LINDA	GRANTING CLOSURE FOR NON-COMMERCIAL 1,100 GALLONS OR LESS FOR UST	2/22	3/15	CONCUR AS AMENDED 3/20	VOTE: 15-3	3/21
SJ0002	HALLIGAN, MIKE	JOINT RESOLUTION IN SUPPORT OF NATIONAL FOREST SERVICE MUSEUM IN MISSOULA	1/14	1/20	CONCUR 1/20	VOTE: 16-2	NATURAL RESOURCES 1/23
SJ0002	HALLIGAN, MIKE	JOINT RESOLUTION IN SUPPORT OF NATIONAL FOREST SERVICE MUSEUM IN MISSOULA	1/26		CONCUR AS AMENDED 1/30	VOTE: 17-1	1/31

MINUTES

**MONTANA
54th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON NATURAL RESOURCES

Call to Order: By Rep. Bill Tash, Vice Chairman, on March 22, 1995, at 3:00 pm.

ROLL CALL

Members Present:

Rep. Dick Knox, Chairman (R)
Rep. Bill Tash, Vice Chairman (Majority) (R)
Rep. Bob Raney, Vice Chairman (Minority) (D)
Rep. Aubyn A. Curtiss (R)
Rep. Jon Ellingson (D)
Rep. David Ewer (D)
Rep. Daniel C. Fuchs (R)
Rep. Hal Harper (D)
Rep. Karl Ohs (R)
Rep. Scott J. Orr (R)
Rep. Paul Sliter (R)
Rep. Robert R. Story, Jr. (R)
Rep. Jay Stovall (R)
Rep. Emily Swanson (D)
Rep. Lila V. Taylor (R)
Rep. Cliff Trexler (R)
Rep. Carley Tuss (D)
Rep. Douglas T. Wagner (R)

Members Excused: None

Members Absent: None

Staff Present: Michael Kakuk, Environmental Quality Council
Alyce Rice, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HJR 29, SB 387
Executive Action: SB 330 Be Concurred In As Amended
SB 387 Be Concurred In As Amended

Tape 1, Side A

Cary Hegreberg, Montana Wood Products Association, opposed HJR 29, but would be willing to work with REP. OHS and the sponsors to help resolve some of the issues.

John Youngberg, Montana Farm Bureau, opposed HJR 29, but agreed with the concept.

Larry Brown, Agricultural Preservation Association, opposed HJR 29.

John Bloomquist, Montana Stockgrowers Association, opposed HJR 29.

Informational Testimony: None

Questions From Committee Members and Responses:

REP. SWANSON told Mr. Clinch that the statement in HJR 29 regarding lands management was not intended to question the number of studies and detailed analysis that the department has on the management of lands and was misleading.

Tape 1, Side B

REP. OHS said one of the issues the interested parties talked about was the return on investments such as grazing fees, farm land leases and recreational fees. He asked Mr. Clinch to comment. Mr. Clinch said if the department needs any direction, it would be in terms of input from investment people.

Closing by Sponsor:

REP. OHS said a meeting would be held with interested parties to address the problems in HJR 29. If it is decided that HJR 29 is not worth pursuing it will be canceled.

HEARING ON SB 387

Opening Statement by Sponsor:

SEN. TOM BECK, Senate District 28, Deer Lodge, said SB 387 proposes an Act that would clarify application of common law rules of issue and claim preclusion to the adjudication of existing water rights; expand the water claim appeal process; clarify standing for objections to water claims; and establish a water adjudication advisory committee. SEN. BECK also provided the committee with amendments to the bill. EXHIBIT 1

Proponents' Testimony:

John Bloomquist, Montana Stockgrowers Association, said the association is very supportive of the adjudication process for

water rights but it needs to be speeded up. The association supports SB 387 and its amendments.

Larry Brown, Agricultural Preservation Association, said the association sees a need for timely conclusion of the adjudication process. There has been a lot of time and money spent on the process and at some point in time that has to cease.

Patty Walker, Glen. Written testimony. EXHIBIT 2

Tape 2, Side A

Jim Quigley, Rancher, said in 1993 water rights issues cost him \$26,000; in 1994 the cost was \$35,000. Through January 1995 his total costs for water rights issues were over \$60,000. Mr. Quigley supported SB 387.

Lorna Frank, Montana Farm Bureau, said SB 387 is needed to take care of some of the problems that bureau members and other people throughout the state are having with the water adjudication process.

Chris Tweeten, Reserve Water Rights Compact Commission, said the commission appeared as an opponent to SB 387 in the Senate because of the late claims provisions and the impact that the bill as introduced had on the water rights negotiation process. Amendments were adopted in the Senate and the commission no longer has objections to the bill.

Holly Franz, Montana Power Company, supported SB 387 and its amendments.

Mike Murphy, Montana Water Resources Association, said he supported SB 387 but had concerns about the conflict of interest associated with the Department of Natural Resources and Conservation's (DNRC) involvement with water rights.

Don MacIntyre, Attorney, Department of Natural Resources and Conservation, Representing the Executive Branch of the Governor's Office, supported SB 387.

Harley Harris, Assistant Attorney General, Department of Justice, On Behalf of Joe Mazurek, Attorney General, supported SB 387 as amended in the Senate and in particular, Attorney General Mazurek is supportive of the concept of an advisory committee to deal with some of the very complicated issues of the adjudication process that are presented by the ongoing water rights administration.

Tape 2, Side B

Lyle Richards, Self, supported SB 387.

Jan Rehberg, Attorney, Late Claimants and Teigen Land and Livestock, said about two-thirds of her water practice includes late claims. The original draft of SB 387 said the court could look at late claims and decide whether it was appropriate to allow those late claims under the traditional concept of equity, which all courts deal with on a daily basis. The concept of equity has been developed over hundreds of years and is a body of law that courts are familiar with handling. If people have substantial reasons for why they didn't file on time, the late claims should be allowed. The Senate didn't want to have anything to do with the late claims part of the bill so it was amended out. Sections 1 through 4 of the bill should be re-inserted. The controversy on late claims is not going to go away just because it is being ignored.

Richard Moe, Self, Two Dot. Written testimony. EXHIBIT 3

Opponents' Testimony: None

Informational Testimony: None

Questions From Committee Members and Responses:

REP. KARL OHS asked Ms. Rehberg how ownership could be proven if a courthouse burned down, all records were lost and someone else claimed the owner's property. Ms. Rehberg said that has occurred with state lands. In 1982 the general feeling was that the lessee owned the water rights on state land. Subsequent to that time a judicial decision came out which said the state owned the water rights. As a consequence, the state did not file water rights claims on a lot of its state lands, the lessee did. The question is, if the state didn't file water rights claims, did it forfeit the right. On one hand, it could be argued that since the state didn't file, it forfeited its rights. On the other hand, it could be argued that if someone filed a claim, it can't be forfeited. Those are the kinds of issues that are going to come up if they aren't resolved. The adjudication process is there to resolve those problems.

REP. AUBYN CURTISS asked Ms. Rehberg what protection exists for late water right claims if SB 387 doesn't pass. Ms. Rehberg said if the bill doesn't pass, people who have late water right claims can go to federal court and claim that the Act is unconstitutional if there have been recent developments in the takings arena which provides some interesting legal arguments that could be pursued. There are also a number of issues that could be raised in state court.

Tape 3, Side A

REP. DOUG WAGNER asked Ms. Rehberg if DNRC would have records showing what water rights have been filed. Ms. Rehberg said DNRC would have the records on water rights claims that have been filed. There is probably a local office in Kalispell that would

also have those records. REP. WAGNER asked Ms. Rehberg if a new claimant, whose claim has been approved, could lose the right to use the water if a water basin has been closed and all the water rights have been adjudicated and a late claim is filed with the approval of the court. Ms. Rehberg said the right to use the water wouldn't be lost if the court has approved the claim. If a judgement is rendered by court and the basin has been closed, the judgement can be reopened under certain circumstances. Excusable neglect, fraud, or some sort of mistake would be some of the reasons.

REP. HAL HARPER asked SEN. BECK if the reasons the Senate took out the late claims portion of the bill was because of federal government interference and that it could extend the water adjudication process for years. SEN. BECK said that was correct. REP. HARPER asked SEN. BECK how the water adjudication study committee would be funded and what the cost would be. SEN. BECK said at present, there isn't a way to fund it. The committee would have to be voluntary, which is unfortunate.

REP. DAVID EWER asked Mr. MacIntyre if the thought it was constitutional that a legal process could be set up which would require people to revalidate property rights they already have and by that process ignore hundreds of years of an Anglo-American process that looks beyond the letter of the law for equity and common law. Mr. MacIntyre said those issues have been debated in the last legislative session and the water policy committee. The state, through the 1993 Legislature, has granted remission of forfeiture. Any late claimant who chooses, can until July 1, 1996, file a late claim which would revive the claimant's water right. REP. EWER asked Mr. MacIntyre if he understood correctly that a late claimant's water rights would be revived but he wouldn't necessarily have first priority on the water, even though the family had the water rights for generations and were first on the streambed. Mr. MacIntyre said if a person had an 1865 water right he would retain that priority date, but it would be subordinate to the claimant who filed a timely claim in 1943. The person with the 1865 water right could be required to deliver the water, but would still be in the system.

REP. JON ELLINGSON asked Ms. Rehberg what kind of notice was given to people initially about the date by which their water rights had to be filed. Ms. Rehberg said notices went out with the tax notices, there were postings in courthouses, meetings were held by DNRC and flyers were sent out. There was extensive notice given and people tried to comply but there were three different deadlines. Deadlines were changed on people, some which were due to human error. REP. ELLINGSON asked if notice was given when the dates were changed. Ms. Rehberg said she thought there would have been some kind of notice but she didn't know for sure. REP. ELLINGSON asked Ms. Rehberg if an entire water basin would have to be re-adjudicated, if late claims on that basin are allowed. Ms. Rehberg replied no.

Tape 3, Side B

REP. ELLINGSON asked Mr. MacIntyre if he agreed with Ms. Rehberg's statement that an entire basin wouldn't have to be re-adjudicated if late claims were allowed on that basin. Mr. MacIntyre said it would depend on the water basin. If the late claim was on a basin that historically had plenty of water, it probably wouldn't make a difference. If there is a water shortage and the first user files a late claim, it would have a significant impact on the adjudication that has taken place. There are no final decrees under the adjudication process. Most decrees are called "temporary preliminary" decrees. Notice of the late claim would have to be given to all parties concerned. Those parties would have to decide whether or not to object.

Closing by Sponsor:

SEN. BECK said he realized that the late claims issue was contentious. Establishing a water adjudication advisory committee has the highest priority at this time. Maybe over the next biennium, the committee could put a stop to some of the litigation.

EXECUTIVE ACTION ON SB 330 Cont'd.

During the first part of executive action held on SB 330 on March 21, 1995, a Be Concurred In motion was made by REP. KARL OHS. REP. OHS also moved an amendment to SB 330 but no vote was taken.

Motion: REP. OHS MOVED A REVISED AMENDMENT TO SB 330.

Discussion:

REP. OHS asked Glenn Marx, Policy Director, Governor Racicot's Office, to explain the amendments. EXHIBIT 4 Mr. Marx said the revised amendment defines who an "interested person" is. The amendment seeks to clarify who can participate in a contested case when the Board of Health and Environmental Sciences (BHES) makes a decision. It also seeks to make sure that the challenge to a board decision is done by someone who has an economic interest in the decision, which means someone who has a motel, hotel, bar or restaurant and caters to anglers or floaters. It also means an outfitter who has a license and makes his or her livelihood from the water quality in that stream. The definition includes a municipality that needs the water supply. A person with a fishing license is not considered to have an economic interest.

REP. BOB RANEY said he didn't understand why ordinary people are not considered interested persons. The water belongs to everyone and they don't have to have an economic interest. Their interests can be social, environmental or fishing. Mr. Marx said anyone can participate in the public hearings and public

comments, but after the board makes a decision, anyone that challenges that decision should have an economic interest.

REP. HAL HARPER said the state constitution guarantees every citizen the right to a clean and healthy environment and the bill, even with the amendment, seems to take away the right of an interested person who may feel that his constitutional right is being threatened. REP. HARPER asked Mr. Marx to comment. Mr. Marx said no one is being prevented from participating in the public process, except after the board makes its decision.

REP. RANEY told Mr. Marx that the right to challenge the board's decision is the most important part.

REP. HARPER said one of the themes espoused by the 1995 Legislature is one of empowering citizens versus agencies. The amendment seems to take that away. REP. HARPER asked if someone could justify that a job provided by a mining industry is more important than a citizen's right to a clean and healthful environment. Mr. Marx said that isn't the way the administration sees it. If a person can show an economic loss because of the board's decision, he has every right to appeal that decision.

REP. RANEY asked who would make the decision that a person who wants to challenge the board's decision truly had an economic interest. Martha Colhoun, EQC, said the board would make that decision.

REP. HARPER said in other words, the board that made the decision that the person would be appealing, would have the power to decide that the person didn't qualify as having an economic interest. Mr. Marx said that didn't sound right.

Tape 4, Side A

VICE CHAIRMAN TASH asked John Bloomquist, Montana Stockgrowers Association if he would comment on who would decide if a person had an economic interest. Mr. Bloomquist said if someone filed an objection on a board decision and the board decided that person didn't have an economic interest, it could be taken to court.

Vote: Voice vote was taken. Motion on the revised amendment carried 12 to 6.

Motion/Vote: REP. PAUL SLITER MOVED SB 330 BE CONCURRED IN AS AMENDED. Voice vote was taken. Motion carried 12 to 6.

EXECUTIVE ACTION ON SB 387

Motion: REP. ROBERT STORY MOVED SB 387 BE CONCURRED IN.

Motion/Vote: REP. STORY MOVED SEN. BECK'S AMENDMENTS TO SB 387. Voice vote was taken. Motion carried unanimously.

Motion: REP. AUBYN CURTISS MOVED JAN REHBERG'S AMENDMENTS TO SB 387.

Discussion:

REP. CURTISS said if claim filings have been lost people shouldn't be penalized.

REP. STORY said he was against the amendments.

REP. BILL TASH said although the amendments were presented as a fairness issue, they aren't fair to those that filed timely claims.

REP. JAY STOVALL said he was against the amendments.

REP. DOUG WAGNER said he was in favor of the amendments because municipality could have filed its claim in a timely manner and because the attorney lost the filing or the courthouse burned down, it has lost its water rights.

REP. HARPER asked CHAIRMAN KNOX if the Rehberg amendments could be voted on even though they weren't in proper format. CHAIRMAN KNOX said yes, but the amendments would have to be put in proper format. REP. HARPER said if the committee didn't want to upset the state's system of water rights and the progress that has been made, didn't want to invite the federal government to take the state's system over and extend the adjudication process, which would be between five and six years, it shouldn't vote for the amendments.

REP. CURTISS said she respected what REP. HARPER said and it wasn't her intention to cause more problems. REP. CURTISS withdrew her motion on the Rehberg amendments.

Motion/Vote: REP. PAUL SLITER MOVED SB 387 BE CONCURRED IN AS AMENDED. Voice vote was taken. Motion carried unanimously.

9x

HOUSE OF REPRESENTATIVES

Natural Resources

ROLL CALL

DATE 3-22-95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Dick Knox, Chairman	✓		
Rep. Bill Tash, Vice Chairman, Majority	✓		
Rep. Bob Raney, Vice Chairman, Minority	✓		
Rep. Aubyn Curtiss	✓		
Rep. Jon Ellingson	✓		
Rep. David Ewer	✓		
Rep. Daniel Fuchs	✓		
Rep. Hal Harper	✓		
Rep. Karl Ohs	✓		
Rep. Scott Orr	✓		
Rep. Paul Sliter	✓		
Rep. Robert Story	✓		
Rep. Jay Stovall	✓		
Rep. Emily Swanson	✓		
Rep. Lila Taylor	✓		
Rep. Cliff Trexler	✓		
Rep. Carley Tuss	✓		
Rep. Doug Wagner	✓		



HOUSE STANDING COMMITTEE REPORT

March 23, 1995

Page 1 of 2

Mr. Speaker: We, the committee on Natural Resources report that Senate Bill 387 (third reading copy -- blue) be concurred in as amended.

Signed: _____

Dick Knox
Dick Knox, Chair

And, that such amendments read:

Carried by: Rep. Story

1. Title, line 9.

Strike: "AUTHORIZING" through "APPOINT"

Insert: "ESTABLISHING"

2. Title, line 10.

Following: "~~85-2-226,~~"

Insert: "3-7-103,"

Following: "85-2-233,"

Insert: ", "

3. Page 5, line 29 through page 6, line 16.

Strike: section 1 in its entirety

Insert: "**Section 1.** Section 3-7-103, MCA, is amended to read:

"3-7-103. Promulgation of rules and prescription of forms -- advisory committee. (1) As soon as practicable the Montana supreme court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in consultation with the water judge and the department of natural resources and conservation.

(2) (a) The chief water judge shall appoint a water adjudication advisory committee to provide recommendations to the water court, the Montana supreme court, the department of natural resources and conservation, and the legislature on methods to improve and expedite the water adjudication process.

(b) The committee consists of three nongovernmental

SB 387

Committee Vote:

Yes 18, No 0.

HOUSE

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attorneys who practice before the water court, one district court judge, and three water users who have filed statements of claim with the department of natural resources and conservation under this chapter.

(c) The chief water judge or the judge's designee shall serve as an ex officio member of the committee. The Montana supreme court may appoint the attorney general or the attorney general's designee, a representative from the department of natural resources and conservation, and a representative of the United States government as ex officio members of the committee.

(d) The committee members shall serve at the pleasure of the water court and shall serve without compensation.

(e) The committee shall file a report with the Montana supreme court by October 1, 1996, and as often as determined by the Montana supreme court."

Renumber: subsequent sections

4. Page 9, lines 1 through 3.

Strike: section 4 in its entirety

Renumber: subsequent section

-END-

Amendments to Senate Bill No. 387
Third Reading Copy

Requested by Sen. Beck
For the Committee on Natural Resources

Prepared by Michael S. Kakuk
March 22, 1995

1. Title, line 9.

Strike: "AUTHORIZING" through "APPOINT"

Insert: "ESTABLISHING"

2. Title, line 10.

Following: "85-2-226,"

Insert: "3-7-103,"

Following: "85-2-233,"

Insert: ", "

3. Page 5, line 29 through page 6, line 16.

Strike: section 1 in its entirety

Insert: "Section 1. Section 3-7-103, MCA, is amended to read:

"3-7-103. Promulgation of rules and prescription of forms -- advisory committee. (1) As soon as practicable the Montana supreme court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in consultation with the water judge and the department of natural resources and conservation.

(2) (a) The chief water judge shall appoint a water adjudication advisory committee to provide recommendations to the water court, the Montana supreme court, the department of natural resources and conservation, and the legislature on methods to improve and expedite the water adjudication process.

(b) The committee consists of three nongovernmental attorneys who practice before the water court, one district court judge, and three water users who have filed statements of claim with the department of natural resources and conservation under this chapter.

(c) The chief water judge or the judge's designee shall serve as an ex officio member of the committee. The Montana supreme court may appoint the attorney general or the attorney general's designee, a representative from the department of natural resources and conservation, and a representative of the United States government as ex officio members of the committee.

(d) The committee members shall serve at the pleasure of the water court and shall serve without compensation.

(e) The committee shall file a report with the Montana supreme court by October 1, 1996, and as often as determined by the Montana supreme court."

Renumber: subsequent sections

Patty Walker
Atlasta Ranch
Box 320081
Glen Montana 59732

March 22, 1995

Dear committee members,

The Montana constitution states that all beneficial water use is hereby recognized and confirmed. I guess this does not apply if you have a late claim. History is a very important thing to preserve and to only preserve a part of historic rights because of a paper mistake is wrong. I have a water source that was claimed by the homesteader in 1910 and has been in continuous use since that date. Our ranch has been the only user of this water since that time. We supposedly have exempt domestic and stock water rights and since Sen. bill 310 our irrigation rights have supposedly been reinstated. Our problem is that we have a late claim and the Department of the Interior (BLM) is doing everything in their power to eliminate our rights. We bought this place in 1987 we call it Atlasta Ranch it was our dream and we didn't mind that it was mostly sagebrush and rock it was a place to build our lives together. For three years the BLM told us we had to sign over our water rights to them because we no longer had any because of the late claim. They told us if we did not they would wait till adjudication and file a water right. That changed when the first congressional inquiry came. After they received the inquiry they initiated a water filing and we had to defend ourselves at a water hearing. The hearing examiner (who was an ex federal employee) after we presented historic testimony from the homesteaders son and our predecessors and numerous letters documenting historic use, said that it was speculation. The BLM presented only opinion and that was called fact. We asked for an on site inspection, he came out to our place and could see the flow for himself, he told my husband that he didn't know all the laws and that he was going to school to learn about them. There is no record that he was ever at our house and in his decision he said that water was flowing where it wasn't. Maybe it is coincidence that his decision was the exact BLM opinion. The BLM didn't get their water permit but the hearing examiner left the door wide open to come back at a later date. The decision was so out of line that we objected only to be told that because the decision was in our favor our objections would not be heard and the decision stood as written.

In 1993 we were maintaining our spring when an armed BLM ranger came out and told us we should stop. He could not tell us that we were breaking any laws the BLM just didn't want us to continue. Soon after that we received a summons to federal court. We endured two years then in Jan. the decision came against us. The BLM in the court case told the court that they acknowledged our water rights and in the first order the judge said that it was subject to our water rights. The BLM submitted a motion to amend the decision to say that it was subject to whatever rights we are

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March 22
Pg 2

adjudged to have. The judge signed it. (we never saw this motion and it was submitted and signed in record time.)

We are supposed to be able to use our water without interference, we have gotten nothing but interference from the BLM. It is not like they don't have any other water to take care of, they do not 200 yards from our spring. They refuse to even invest \$10.00 in a pipe to get it to the stocktank. Instead they sue us to take ours away and they withhold important information from the court to achieve their goal. Their goal is to eliminate all water rights that come up on public land. ~~(that's the goal)~~

I want to know when my rights are going to be upheld. We have written to the governor asking for help after all he can pardon murders and he tells us how it is to bad and he will do nothing to help. Our attorney generals office doesn't answer our letters because they are too busy defending the federal government instead of Montanans. In all the years that I have come up here the atty. generals office has never stood up for us with late claims. They whine about these compacts and it seems to me that they made their bed by totally ignoring historic water rights whether they were late or not. Surely they have always known that someday we would be let back in.

The system has failed for us over and over again and when you have a problem with the federal government no one will help you. I understand now why people resort to violence. They talk and talk and sometimes scream and no one hears their pleas for help, then they resort to violence and all the sudden everyone is listening. It shouldn't be that way. I am here as living proof of what a bad law does, I have lived it for eight years now. It has destroyed my life, my husbands life and my two sons lives. My husband has been put on medication because of the depression and violent behavior this has caused. My heart breaks when my boys cry and want to know why this is happening to them and when is it going to stop. My youngest son for Christmas the first thing on his list was for the government to leave us alone. All we want is to be left alone and live in peace. All we want is our day in court to defend our historic water rights. I ask that you not give the federal government any more power to destroy any more lives. I ask this for the thousands that will come behind us please, please let the water judge decide who gets what water rights.

I would like to know if any of you have talked to your constituents who have late claims. If not I ask you to do so after all this bill affects their lives. I believe you have a responsibility to do so. Please do what is right for the late claims and protect Montanas water history. Don't let any more families be destroyed.

Sincerely,

Patty Walker
Patty Walker

Patty Walker
Atlasta Ranch
Box 320081
Glen, Montana 59732

Feb. 16, 1995

To whom it may concern,

I come here today because I have a late claim and I want you to know what has happened to my family because of it. My husband and I bought our place in 1987, it is an old homestead and mostly rock and sagebrush. We did not get up one morning and decide that today we were going to file a water claim late. No the homesteader in 1910 got up one morning and went out with his shovel and dug out the spring and started to use the water on what is our place today. Our predecessor for whatever reason missed filing on this spring, and we have filed a late claim. This water has been in continuous use since 1910. Because of our late claim the Bureau of Land Management has decided that it wants our water, not because it needs water but because it felt that we no longer had any right to it. We have been taken in front of a water hearing and had to defend our historic water rights. The BLM lost but the hearing examiner left the door wide open for them to try again to take our water away. This was before Sen. bill 310 was passed. Then in 1992 we were cleaning out our spring when an armed BLM ranger came and tried to stop us from maintaining our spring. I have to say that every time we have tried to do any work on our spring the BLM has interfered with threats and intimidation. The last threat was our invitation to federal court in 1992. Judge Hatfield ruled last month that we as the defendants were guilty and had to prove ourselves innocent. That we after three owners and forty years, that we as the defendants had the burden of proof. And with that after he had the case for two years instead of giving the BLM what they asked for he gave the BLM our entire ranch. The BLM will stop at nothing to take our water away from us because of this late claim and because we will not sign our water rights over to them. We are awaiting our third invitation to defend ourselves and our water in court. Our BLM file says that the BLM intends to protest every single water right that originates on public land. That will be our forth invitation to court brought by the BLM.

All of this has happened in the eight years that we have had this place. All we want is to be left alone and live in peace and enjoy this place as our predecessors did. This has destroyed my life, my husbands life and my two sons lives. My husband has had to be put on medication because of the depression all of this has caused and I can't begin to tell you what it does to me when my 11 year old son for christmas the first thing on his list is for the government to leave us alone. Maybe there is nothing you can do to stop what is happening to us but PLEASE, please do something so that no other family has to go through what mine has.

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Oct. 6, 1994

Patty Walker
Atlasta Ranch
Box 320081
Glen, Montana
59732

Dear Water Policy Committee,

I come before you today like I have so many times before that I have lost count. I have attended almost every hearing since the beginning of Senate Bill 310 and have tried to tell you why some of us non perfect Montanans need some help from you our elected representatives. I am not here to air my laundry to you, I am here because of a bad law that has enabled the Federal Government to destroy my life, my husbands life and my two sons lives. I did not make this filing mistake but my family is paying for it.

Throughout all of these hearings you have commented that the timely filers are upset about further remissions. I just have one question and that is where are all these people? In all the hearings there was only one person who spoke in opposition of Sen. 310 and he was upset because if the late filers were let in he would lose his windfall. Our own Attorney Generals office, who is supposed to work for Montanans gets a threatening letter from the Federal Government and has turned its back on us and is doing back flips for the Feds. I have to wonder if some behind the door deal has been made between the Federal Government and the State of Montana in regard to late claims. I have to wonder who is looking out for Montanas interests.

A late claim does not guarantee a water right, yes we are let in to be heard but a water right is nothing without a priority date. What is the harm in further remissions? We have to pay \$300.00 to be heard and all court costs if it is protested. It won,t cost the state anything because the late filers are paying the bill. What is so wrong with letting the Water Judge decide on a case by case basis who gets what water rights.

It would be nice if we lived in a world that was perfect and nobody ever made a mistake, but the fact is that we are human and we are not always perfect. I hope that when the next supposed inventory is taken perhaps this time the State will want you to file on all the property you own, I hope that you continue to be perfect and get all your papers filed on time because if you don,t you will lose everything you have worked hard for with no chance of ever getting it back.

I do not enjoy coming to these hearings and having to tell you what has happened to me. Everytime I leave my house and drive two hours to get here I am always hoping and praying that today is the day that someone will do something to help. Then on the way home I realize that all the time and effort has fallen on deaf ears. It takes courage to change a bad law and courage to go the distance to help those of us that are not perfect. I applaud you Senators Swift and Mesaros for listening and understanding and standing up for Montana, your constituents are well served by you. I will always have the upmost respect for both of you. Thankyou for trying.

Patty Walker

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Feb 16
pg 2

Several years ago the legislature passed a law saying that for something as minor as a filing mistake historic rights would vaporize without even a chance to explain. I am asking you to make it right.

Sincerely,

Patty Walker
Patty Walker

To: House Natural Resources Committee
From: Richard Moe
Re: SB 387 Hearing Date: March 22, 1995
3 PM. Room 437

In 1982 water right holders were asked to identify and list all water rights with a state wide adjudication process. They were notified by letters, through local papers, notices at county court houses, and other means. The original deadline was twice postponed. Over 98% of water right holders filed their water rights by the April 30, 1982 deadline.

The Montana Supreme Court ruled against late claimants and that the filing process and the April 30, 1982 deadline were legal. The 1993 Legislature passed a bill allowing "postmark late claims" and a provision allowing other late claims junior water rights. Now, again in 1995 the Legislature is discussing the late claims issue.

When is it going to end? How much longer are a few individuals who missed filing ~~water~~ water rights by the

correct procedure going to drag this process out?

I ask the House Natural Resources Committee to not reinsert late claims provisions, allowing the court to decide if and to what extent late claims should be allowed ~~in~~ S.B. 387.

It's time to move on with the water right adjudication process and allow the 98% of us who filed our claims by the April 30, 1982 deadline have this process completed.

Thank You

Richard Moe

Box 238

Two Dot Mt 59085

HOUSE OF REPRESENTATIVES

VISITOR'S REGISTER

COMMITTEE

BILL NO.

S.B. 38

DATE

3-22-95

SPONSOR(S)

Senator Deck

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	BILL	OPPOSE	SUPPORT
JIM C. QUIGLEY AVON. MT. 59713 Jim C. Quigley Avon, Mt.	SELF Self	SB 387		✓
Patty Walker	self	387		X
Spencer Walker	Self	387		X
RD Amdahl	SA Lee	383	X	
Eugene Munday	Self			✓
Jan Rehberg	Teigen Land & Livestock	387		✓
Lyle Richards	Self			✓
Wesley Teigen	Teigen Land & Livestock	387		✓
Richard Moe	Self	387	✓	
John Blomquist	Mt. Stockgrowers	387		✓
Larry Brown	Ag Pres. Assoc.	387		✓ with Amen
Lorna Frank	Mt. Farm Bureau	387		✓
MIKE MURPHY	MT WATER RES. ASSN	387		X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

SENATE BILL NO. 387

INTRODUCED BY BECK

A BILL FOR AN ACT ENTITLED: "AN ACT ~~PROVIDING ADDITIONAL FORFEITURE REMISSION FOR PERSONS FILING LATE WATER CLAIMS; IDENTIFYING CERTAIN SITUATIONS IN WHICH OBJECTIONS TO A WATER CLAIM MUST BE DISMISSED~~ CLARIFYING APPLICATION OF COMMON-LAW RULES OF ISSUE AND CLAIM PRECLUSION TO THE ADJUDICATION OF EXISTING WATER RIGHTS; EXPANDING THE WATER CLAIM APPEAL PROCESS; CLARIFYING STANDING FOR OBJECTIONS TO WATER CLAIMS; ~~ESTABLISHING~~ AUTHORIZING THE GOVERNOR TO APPOINT ~~ESTABLISHING~~ A WATER ADJUDICATION ADVISORY COMMITTEE; AMENDING SECTIONS ~~3-7-103, 85-2-214, 85-2-221, 85-2-225, 85-2-226,~~ 3-7-103, 85-2-233, AND 85-2-235, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

STATEMENT OF INTENT

~~A statement of intent is necessary for this bill because [section 1] encourages the Montana supreme court and the water court to adopt procedural rules. The legislature intends that the courts adopt abandonment relief rules that recognize the courts' existing equitable powers. These rules should consider and adopt equitable principles and existing rules of procedure, including but not limited to the equitable principles of detrimental reliance, good cause, equitable tolling, and excusable neglect and Rules 55 and 60, Montana and Federal Rules of Civil Procedure. The courts may by rule identify certain situations in which relief from abandonment will be granted after 1996 and under what terms relief will be granted in order to secure the interests of justice and may establish procedures for implementing [this act].~~

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

~~Section 1. Section 85-2-214, MCA, is amended to read:~~

~~"85-2-214. Commencement of action. (1) The action for the adjudication of all existing water rights under this part, part 7, and Title 3, chapter 7, is commenced with the issuing of the order by the Montana supreme court to file a statement of a claim of an existing water right as provided in 85-2-212. As to each claim, the action is considered filed in the judicial district of the county in which the diversion is made or, if there is a claimed right with no diversion, in the judicial district of the county in which the~~

1 ~~use occurs.~~

2 ~~(2) The water judge shall monitor the claim filing procedure for claims within his the water division~~
3 ~~and make any orders necessary to assure timely and accurate compliance with the claim filing procedure.~~

4 ~~(3) The water judge may relieve a party from abandonment of a claim under 85-2-226, as follows:~~

5 ~~(a) For claims filed after July 1, 1996, but before the issuance of a preliminary decree, relief may~~
6 ~~be granted for good cause shown and upon those terms as are just and in accordance with 85-2-224.~~

7 ~~(b) For claims filed after the entry of a preliminary decree, relief may be granted under the~~
8 ~~provisions of Rule 60, Montana Rules of Civil Procedure.~~

9 ~~(4) The Montana supreme court and the water court are encouraged to adopt procedural rules~~
10 ~~required to implement the provisions of subsection (3)."~~

11
12 ~~Section 2. Section 85-2-221, MCA, is amended to read:~~

13 ~~"85-2-221. Filing of claim of existing water right filing late claim. (1) A person claiming an~~
14 ~~existing right, unless exempted under 85-2-222 or unless an earlier filing date is ordered as provided in~~
15 ~~85-2-212, shall file with the department no later than June 30, 1983, a statement of claim for each water~~
16 ~~right asserted on a form provided by the department.~~

17 ~~(2) The department shall file a copy of each statement of claim with the clerk of the district court~~
18 ~~for the judicial district in which the diversion is made or, if there is a claimed right with no diversion, the~~
19 ~~department shall file a copy of the statement of claim with the clerk of the district court of the judicial~~
20 ~~district in which the use occurs.~~

21 ~~(3) Subject to certain terms and conditions, the legislature intends to provide for the remission of~~
22 ~~the forfeiture of existing rights to the use of water caused by the failure to comply with subsection (1) as~~
23 ~~provided under 85-2-214. Accordingly, with respect only to a basin that has not been closed to further~~
24 ~~appropriation pursuant to a compact ratified by the legislature under part 7 of this chapter prior to July 1,~~
25 ~~1993, a claim of an existing water right not filed with the department on or before April 30, 1982, may be~~
26 ~~filed with the department on or before July 1, 1996, on forms provided by the department. This section~~
27 ~~is not intended to prevent allow the filing of a late claim in addition to a claim of an existing water right filed~~
28 ~~on or before April 30, 1982, if and to the extent that the additional right claimed is not the same as the~~
29 ~~right that was the subject of a previous claim and is not an abandoned right. Claims must be physically~~
30 ~~submitted to the department or sent by United States mail, postmarked on or before the deadline set forth~~

1 in this subsection, in order to be considered timely. The Late claims are then subject to adjudication by the
2 district courts as any other claim of existing right. The claimant is then subject to all rights and obligations
3 of any other party, except that water court, subject to the provisions of this part, rules adopted by the
4 Montana supreme court or the water court, and the following:

5 (a) ~~a late claim must be incorporated into the adjudication, subject to all proceedings that have~~
6 ~~taken place prior to the date of filing;~~

7 (b) ~~the person filing a late claim may request that a decree previously entered be reopened or may~~
8 ~~object to matters previously determined on the merits by the water court only to the extent that the request~~
9 ~~or objection is otherwise authorized by law and is based on a claim of water right filed on or before April~~
10 ~~30, 1982;~~

11 (c) ~~a person filing a late claim does not have the right or standing to object to any water rights~~
12 ~~compact reached in accordance with part 7 of this chapter that is ratified by the legislature prior to July~~
13 ~~1, 1993, except to the extent that right or standing to object exists based on a claim of water right filed~~
14 ~~on or before April 30, 1982, or to claim protection for the right represented in the late claim under any~~
15 ~~provision of such a compact that subordinates the use of a water right recognized in the compact to a right~~
16 ~~recognized under state law;~~

17 (d) ~~if the water judge, following objection under 85-2-233, finds that the right represented in the~~
18 ~~late claim was the subject of a prior order or decree by the water judge or is otherwise without merit, the~~
19 ~~water judge shall award costs and reasonable attorney fees to the person or persons filing the an objection~~
20 ~~to a late claim;~~

21 (e) ~~a right represented in a late claim is may be subordinate to all federal and Indian reserved water~~
22 ~~rights established by compact or decree under this chapter other water rights upon terms that the court~~
23 ~~determines are just under the circumstances;~~

24 (f) ~~unless a late claim either was placed in the United States mail and postmarked on or before April~~
25 ~~30, 1982, or, if there is no evidence of the date of mailing, there is evidence of execution on or before April~~
26 ~~30, 1982, and actual receipt by the department on or before May 7, 1982, the right represented in the~~
27 ~~claim is, in addition, subordinate to:~~

28 (i) ~~rights represented in all valid, timely filed claims; and~~

29 (ii) ~~rights represented in a permit or reservation of water issued under this chapter if and to the~~
30 ~~extent that the person holding the permit or reservation files an objection under this part and proves that~~

1 the person holding the permit or reservation reasonably relied to the detriment of the person holding the
2 permit or reservation upon the failure of the claimant to file a claim on or before April 30, 1982.

3 ~~(4) The department and the district courts may not accept any statements of claim physically~~
4 ~~submitted or postmarked after July 1, 1996, and shall notify a person who files a claim after July 1, 1996,~~
5 ~~that the claim will not be accepted late claims filed after July 1, 1996, are subject to the provisions of~~
6 ~~85-2-214(3)(a).~~"

7
8 **Section 3.** Section 85-2-225, MCA, is amended to read:

9 ~~"85-2-225. Filing fee—processing fee for remitted claims. (1) Each claim filed under 85-2-221~~
10 ~~or 85-2-222 must be accompanied by a filing fee in the amount of \$40, subject to the following exceptions:~~

11 ~~(a) the total filing fees for all claims filed by one person in any one water court division may not~~
12 ~~exceed \$480; and~~

13 ~~(b) no a filing fee is not required accompanying a claim of an existing right that is included in a~~
14 ~~decree of a court in the state of Montana and that is accompanied by a copy of that decree or pertinent~~
15 ~~portion thereof of the decree.~~

16 ~~(2) A claim that is exempt from the filing requirements of 85-2-221(1) but that is voluntarily filed~~
17 ~~must be accompanied by a filing fee in the amount of \$40. Exempt claims for a single development with~~
18 ~~several uses if filed simultaneously may be accompanied by a filing fee in the amount of \$40.~~

19 ~~(3) (a) Except as provided in subsection (3)(c), in addition to the filing fee set forth in subsection~~
20 ~~(1), each statement of claim filed under 85-2-221(3) must be accompanied by a processing fee in the~~
21 ~~amount of \$150, which must be deposited in the water rights adjudication account for the examination of~~
22 ~~late claims by the department and for the publication of notices by the department as required under~~
23 ~~85-2-213(2).~~

24 ~~(b) The water judge shall may assess against the late claimant all reasonable administrative costs~~
25 ~~and expenses that may be incurred by the court due to the filing of the late claim and the consideration of~~
26 ~~the objection, which in reaching a determination whether to relieve a party from abandonment as provided~~
27 ~~in 85-2-214. The court may award other fees and expenses against the party asserting a late claim as it~~
28 ~~determines just under the circumstances. Any assessment rendered by the court must be deposited in the~~
29 ~~water rights adjudication account.~~

30 ~~(c) For a statement of claim that was filed after April 30, 1982, but prior to July 1, 1993, or for~~

1 a statement of claim filed by a state agency, the processing fee provided for in subsection (3)(a) must be
2 paid on or before a date to be established by the department by rule, but no later than July 1, 1999."

3
4 **Section 4.** ~~Section 85-2-226, MCA, is amended to read:~~

5 ~~"85-2-226. Abandonment by failure to file claim. The Except as provided in 85-2-214, the failure~~
6 ~~to file a claim of an existing right as required by 85-2-221(1) establishes a conclusive presumption of~~
7 ~~abandonment of that right."~~

8
9 **Section 5.** ~~Section 3-7-103, MCA, is amended to read:~~

10 ~~"3-7-103. Promulgation of rules and prescription of forms advisory committee. (1) As soon as~~
11 ~~practicable the Montana supreme court may promulgate special rules of practice and procedure and shall~~
12 ~~prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in~~
13 ~~consultation with the water judge and the department of natural resources and conservation.~~

14 ~~(2) (a) The chief water judge shall appoint a water adjudication advisory committee to provide~~
15 ~~recommendations to the water court, the Montana supreme court, the department of natural resources and~~
16 ~~conservation, and the legislature on methods to improve and expedite the water adjudication process.~~

17 ~~(b) The committee consists of four attorneys who practice before the water court and three water~~
18 ~~users who have filed statements of claim with the department of natural resources and conservation under~~
19 ~~this chapter.~~

20 ~~(c) The chief water judge or the judge's designee shall serve as an ex-officio member of the~~
21 ~~committee. The Montana supreme court may appoint the attorney general or the attorney general's~~
22 ~~designee and a representative from the department of natural resources and conservation as ex-officio~~
23 ~~members of the committee.~~

24 ~~(d) The committee members shall serve at the pleasure of the water court and shall serve without~~
25 ~~compensation.~~

26 ~~(e) The committee shall file a report with the Montana supreme court by October 1, 1996, and as~~
27 ~~often as determined by the Montana supreme court."~~

28
29 **NEW SECTION. SECTION 1. WATER ADJUDICATION ADVISORY COMMITTEE APPOINTMENT.**

30 **(1) THE GOVERNOR SHALL APPOINT A WATER ADJUDICATION ADVISORY COMMITTEE TO PROVIDE**

~~RECOMMENDATIONS TO THE WATER COURT, THE MONTANA SUPREME COURT, THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, AND THE LEGISLATURE ON METHODS TO IMPROVE AND EXPEDITE THE WATER ADJUDICATION PROCESS.~~

~~(2) THE COMMITTEE CONSISTS OF THREE NONGOVERNMENTAL ATTORNEYS WHO PRACTICE BEFORE THE WATER COURT, ONE DISTRICT COURT JUDGE, AND THREE WATER USERS WHO HAVE FILED STATEMENTS OF CLAIM WITH THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION UNDER TITLE 3, CHAPTER 7.~~

~~(3) THE CHIEF WATER JUDGE OR THE JUDGE'S DESIGNEE SHALL SERVE AS AN EX OFFICIO MEMBER OF THE COMMITTEE. THE GOVERNOR MAY APPOINT THE ATTORNEY GENERAL OR THE ATTORNEY GENERAL'S DESIGNEE, A REPRESENTATIVE FROM THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, AND A REPRESENTATIVE OF THE UNITED STATES GOVERNMENT AS EX OFFICIO MEMBERS OF THE COMMITTEE.~~

~~(4) THE COMMITTEE MEMBERS SHALL SERVE AT THE PLEASURE OF THE GOVERNOR AND SHALL SERVE WITHOUT COMPENSATION.~~

~~(5) THE COMMITTEE SHALL FILE A REPORT WITH THE GOVERNOR BY OCTOBER 1, 1996, AND AS OFTEN THEREAFTER AS DETERMINED BY THE GOVERNOR.~~

SECTION 1. SECTION 3-7-103, MCA, IS AMENDED TO READ:

"3-7-103. Promulgation of rules and prescription of forms -- advisory committee. (1) As soon as practicable the Montana supreme court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with this chapter and Title 85, chapter 2, parts 2 and 7, in consultation with the water judge and the department of natural resources and conservation.

(2) (a) The chief water judge shall appoint a water adjudication advisory committee to provide recommendations to the water court, the Montana supreme court, the department of natural resources and conservation, and the legislature on methods to improve and expedite the water adjudication process.

(b) The committee consists of three nongovernmental attorneys who practice before the water court, one district court judge, and three water users who have filed statements of claim with the department of natural resources and conservation under this chapter.

(c) The chief water judge or the judge's designee shall serve as an ex officio member of the committee. The Montana supreme court may appoint the attorney general or the attorney general's

designee, a representative from the department of natural resources and conservation, and a representative of the United States government as ex officio members of the committee.

(d) The committee members shall serve at the pleasure of the water court and shall serve without compensation.

(e) The committee shall file a report with the Montana supreme court by October 1, 1996, and as often as determined by the Montana supreme court."

Section 2. Section 85-2-233, MCA, is amended to read:

"85-2-233. Hearing on temporary preliminary decree or preliminary decree. (1) (a) For good cause shown and subject to the provisions of subsection (7), a hearing shall must be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by:

(i) the department;

(ii) a person named in the temporary preliminary decree or preliminary decree;

(iii) any person within the basin entitled to receive notice under 85-2-232(1); or

(iv) any other person who claims rights to the use of water from sources in other basins that are hydrologically connected to the sources within the decreed basin and who would be entitled to receive notice under 85-2-232 if ~~his~~ the claim or claims were from sources within the decreed basin.

(b) For the purposes of this subsection (1), "good cause shown" means a written statement showing that a person has an ownership interest in water or its use that has been affected by the decree.

(c) A person does not waive the right to object to a preliminary decree by failing to object to a temporary preliminary decree. However, a person may not raise an objection to a matter in a preliminary decree if ~~he~~ that person was a party to the matter when the matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary decree, unless the objection is allowed for any of the following reasons:

(i) mistake, inadvertence, surprise, or excusable neglect;

(ii) newly discovered evidence that by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), Montana Rules of Civil Procedure;

(iii) fraud, misrepresentation, or other misconduct of an adverse party;

(iv) the judgment is void; or

(v) any other reason justifying relief from the operation of the judgment.

(2) If a hearing is requested, the request must be filed with the water judge within 180 days after entry of the temporary preliminary decree or preliminary decree. The water judge may, for good cause shown, extend this time limit up to two additional 90-day periods if application for an extension is made prior to expiration of the original 180-day period or any extension of it.

(3) The request for a hearing ~~shall~~ must ~~contain a precise statement of the findings and conclusions in the temporary preliminary decree or preliminary decree with which the department or person requesting the hearing disagrees. The request shall~~ must specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request ~~shall~~ must state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the temporary preliminary decree or preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing ~~shall~~ must be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e), Montana Rules of Civil Procedure.

(5) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or 85-2-703 bars any subsequent cause of action in the water court.

(6) If the court sustains an objection to a compact, it may declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact ~~shall be is~~ permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall ~~thereafter~~ issue a new preliminary decree in accordance with 85-2-231; ~~provided, however~~ However, that any party to a compact declared void may appeal from ~~such~~ that determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal ~~shall stay~~ stays the period for filing a statement of claim as required under this subsection.

(7) Upon petition by a claimant, the water court shall MAY grant a motion for dismissal to an objection to a temporary preliminary or preliminary decree if the objection pertains to an element of a water right that was previously decreed and: IF DISMISSAL IS CONSISTENT WITH COMMON-LAW PRINCIPLES OF ISSUE AND CLAIM PRECLUSION.

- ~~(a) the objector or the objector's predecessor in interest was a party to the previous decree;~~
 - ~~(b) the claimant's water right was challenged in the previous decree litigation;~~
 - ~~(c) the claimant's water right was actually litigated;~~
 - ~~(d) a determination was made by the court regarding the elements of the water right that are the subject of objection; and~~
 - ~~(e) the right as claimed conforms to the previous decree.~~
- (8) THE PROVISIONS OF SUBSECTION (7) DO NOT APPLY TO ISSUES ARISING AFTER ENTRY OF THE PREVIOUS DECREE, INCLUDING BUT NOT LIMITED TO THE ISSUES OF ABANDONMENT, EXPANSION OF THE WATER RIGHT, AND REASONABLE DILIGENCE."

Section 3. Section 85-2-235, MCA, is amended to read:

"85-2-235. Appeals from final decree. (1) A person whose existing rights and priorities are determined in ~~the~~ a final decree may appeal the determination only if:

- ~~(1)(a) he~~ the person requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree; or
- ~~(2)(b) his~~ the person's rights or priorities as determined in the temporary preliminary decree or the preliminary decree were affected as the result of an objection filed by another person.

(2) An interlocutory ruling by the water judge upon a motion raising a question of law may be appealed by any party affected by the decision and who participated in the proceedings on the motion
MATTER IN WHICH THE RULING WAS ISSUED."

~~NEW SECTION. SECTION 4. CODIFICATION INSTRUCTION. [SECTION 1] IS INTENDED TO BE CODIFIED AS AN INTEGRAL PART OF TITLE 2, CHAPTER 15, PART 2, AND THE PROVISIONS OF TITLE 2, CHAPTER 15, PART 2, APPLY TO [SECTION 1].~~

NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

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